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No. 52

# Supreme Court of the United States

## *October Term, 1948*

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instruction of the Territory of Hawaii,

*Appellants,*

vs.

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, et al,

*Appellees.*

**Upon Appeal from the District Court of the United States for the District of Hawaii**

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No. 52

# Supreme Court of the United States

## *October Term, 1948*

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instruction of the Territory of Hawaii,

*Appellants*,

vs.

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, et al,

*Appellees.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

# *Brief for Appellants*

## THE OPINIONS BELOW

Three opinions were rendered by a specially constituted three-judge District Court for the District of Hawaii. The opinion granting an injunction as prayed

for is reported in 74 F. Supp. 852. The majority opinion of the three-judge court regarding applicability of section 266 of the Judicial Code in the Territory of Hawaii (formerly 28 U.S.C. 380, now Title 28 U.S. Code, sections 1253, 2101, 2281 and 2284) is reported in 74 F. Supp. 852 at page 858. The dissenting opinion of the three-judge court on this question is reported in 74 F. Supp. 852 at page 861.

The order of the single United States district judge denying a preliminary injunction, which order included findings of fact and conclusions of law, is not reported but will be found in the printed record at page 47.

## JURISDICTION

There was presented to a three-judge district court in Hawaii federal issues as to alleged deprivation of liberty and property without due process of law under the Fifth Amendment, and alleged deprivation of rights protected by the Civil Rights Act (8 U.S.C.A. 41-43). The three-judge court found that the territorial statute, Act 104 of the Session Laws of Hawaii 1943, now chapter 31 of the Revised Laws of Hawaii 1945 (Appendix I) violated the constitutional rights of appellees (plaintiff school corporations and a teacher of Chinese language), and granted an injunction against enforcement of the Act. Pursuant to section 266 of the Judicial Code as amended (formerly 28 U.S.C. 380, now sections 1253, 2101, 2281 and 2284 of Title 28 U.S. Code), and section 238 of the Judicial Code as amended (28 U.S.C. 345, now repealed), direct appeal to this Court was taken by the appellants on April 16, 1948 from the final amended judgment of the three-judge court made and entered February 13, 1948 (R. 77). This Court, by order entered June 1,

1948, after reciting that the statement of jurisdiction had been considered, postponed further consideration of the question of the jurisdiction of this Court to the hearing of the case on the merits (R. 597).

In addition to the procedure of taking a direct appeal to this Court as described above, appellants likewise noted and perfected their appeal to the United States Court of Appeals for the Ninth Circuit (R. 591-595).[1] Appellants have further petitioned this Honorable Court to grant certiorari to the Ninth Circuit Court of Appeals, before judgment, pursuant to section 1254(a) of Title 28, U.S. Code, formerly section 240(a) of the Judicial Code (28 U.S.C. 347(a)). This petition requests that the Court consider it in conjunction with the direct appeal to this Court. Appellants respectfully show unto this Honorable Court that the record, briefs and arguments in connection with the direct appeal are identical with, and might be treated as, the record, briefs and arguments upon the return of certiorari, the application being similar, as to procedure, to that in *Ex Parte Quirin*, 317 U.S. 1.

The jurisdiction of the three-judge court, and the appellate jurisdiction in this case, are reviewed in Point I of this brief. We submit that this Court should entertain the case upon one or the other of the procedures submitted, that is:

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[1]This appeal was taken April 16, 1948, which was sixty days after the final amended judgment, entered February 13, 1948, the governing law then allowing three months for appeal. The amendment of Rule 73 having taken effect on March 19, 1948, the court, pursuant to stipulation, entered an order under Rule 86(b) so as to make the former procedure applicable to the taking of the appeal (R. 592-593).

(a) This Court should sustain the jurisdiction of the three-judge court and the direct appeal to this Court; or

(b) In the event this Court does not sustain the jurisdiction of the three-judge court, or holds that at the time in question there was no direct appeal to this Court from a court in Hawaii[1] then this Court should grant certiorari to the Court of Appeals (in which the appeal then would lie), before judgment.

We submit that the novelty of the procedural questions involved justifies the alternative application above presented, this Court being assured that once it has determined the applicability of the three-judge court procedure in Hawaii, the dilemma now presented will not arise again.

## STATEMENT OF THE CASE

This case involves the validity of an entire statute of the Territory of Hawaii, Act 104 of the Session Laws of Hawaii 1943, now chapter 31 of the Revised Laws of Hawaii 1945, Appendix I. The entire statute is involved inasmuch as the statute as a whole was declared unconstitutional by the three-judge district court (R. 77 and 113). Briefly stated, this statute seeks to defer bilingual courses of study until a child has passed the fourth grade.

The original bill of complaint was filed by the appellee school corporations only (R. 3). It alleged that enforcement of the statute would deprive the school corporations of their liberty and property without due

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[1]Prior to enactment of Title 28 of the U.S. Code, Hawaii was subject to a special law governing appeals from the district court, reviewed infra, Point I.

process of law, and would deprive them of the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments of the Constitution, and prayed for injunctive relief, both temporary and permanent. Application for a temporary or preliminary injunction was heard by a single United States district judge, and denied (R. 47). It was assumed for the purposes of this ruling that section 266 was inapplicable, neither side then contending that it was applicable.

Subsequently "defenses in law", contained in the answer filed by appellants (R. 20), were set for hearing before trial (R. 50-51), together with a motion to dismiss the complaint (R. 51-52). The defenses in law were overruled and the motion to dismiss denied by a single United States district judge (R. 116, 457). This judge then decided to convene a three-judge court, but no order to that effect was entered until the three-judge court itself, by a majority of two, one judge dissenting, ruled on its jurisdiction (R. 117-118, 87-101).

When the three-judge court convened for trial of the question on the merits (R. 135), an amended complaint was filed, joining as additional plaintiffs (appellees), two parents of prospective pupils of the school corporations, and the plaintiff teacher (R. 56). The amended complaint sought both injunctive and declaratory relief and relied on the Civil Rights Act, 8 U.S.C., sections 41-43, and on the Fifth Amendment of the Constitution. It prayed for a three-judge court, which was a prayer not contained in the original complaint. It repeated the prayer of the original complaint for injunction pendente lite, but this application was not renewed by motion or in any way pressed before the three-judge court.

Defendants filed an answer to the amended complaint (R. 64) again setting up defenses in law, and answering the averments of the amended complaint. This answer, as had the original answer, further averred (R. 72-76) that the simultaneous pursuit at too early an age of intensive study of dissimilar languages, particularly when the foreign languages are as dissimilar from English as are the oriental languages, adversely affects the attaining of proficiency in either language, causes emotional disturbances, contributes to the deficiency in English—the medium of instruction in the basic school studies—which is a serious problem in the schools of the Territory, and conflicts with the acquisition by children of their education in the basic studies, all of which is contrary to the health and welfare of the children concerned; further, that it is not necessary to the learning of a foreign language that a child undertake a course of study therein earlier than the fifth grade.

At the trial evidence was produced for and against said averments. Furthermore, by stipulation, all proceedings and evidence previously had and adduced on the hearing of the defenses in law and the motion to dismiss were considered the same as though brought before the three-judge court (R. 76).

On February 11, 1948, the three-judge court filed its amended findings of fact and conclusions of law (R. 109), and made and entered its amended judgment (R. 113), based on its opinion of October 22, 1947 (R. 77). It dismissed the complaint as to the two plaintiff parents on jurisdictional grounds, and granted an injunction in favor of the appellee school corporations and the appellee teacher of Chinese.

The amended judgment decreed that appellee school corporations were entitled to teach foreign languages in their schools to students, regardless of whether said students have or have not passed any grade in the public schools or its equivalent, and enjoined appellants from enforcing or attempting to enforce against said appellee school corporations and appellee teacher, the provisions of the aforesaid statute, Appendix I.

## SPECIFICATION OF ERRORS

The three-judge District Court in Hawaii is in error in this case in that:

1. The court erred in holding that as to each of the plaintiff-appellee school corporations, the matter in controversy exceeds $3,000. exclusive of interest and costs (Assignments of Error 3-6 and 34, R. 123, 127, argued Point II, *infra*).

2. The court erred in failing to dismiss the action for failure of the complaint to state a claim for equitable or other relief (Assignments of Error 1, 2, 7-9, R. 123, 124, argued Point III, *infra*).

3. The court erred in placing its decision upon the basis of its own construction of the statute, which had not theretofore been construed by the courts of the Territory, and in failing to dispose of the primary issue as to the power of the legislature to enact such a statute, leaving questions as to the form of the statute to be disposed of by the territorial courts (Assignments of Error 10, 15, and 21, R. 124, 125, argued Point IV and parts D and E of Point V, *infra*).

4. The court erred in considering hypothetical cases and in failing to confine its consideration to the case or cases presented by the pleadings and the in-

tended application of the statute by defendant-appellants. (Assignments of Error 11, 12 and 13, R. 124, argued Point IV, *infra.*)

5. The court erred in failing to sustain the statute as based upon facts bringing it within the legislature's prerogatives under the police power, as parens patriae (Assignments of Error 14-29, 31, 34, 38, 40, R. 124-129, argued Point V, parts A and E, *infra.*)

6. The court erred in failing to apply the usual presumptions of constitutionality, and in failing to sustain the legislative findings as supported by sufficient evidence, irrespective of a conflict in the evidence (Assignments of Error 14-17, R. 124-125, argued Point V, parts B and C, *infra.*)

7. The court erred in interpreting the legislative findings as findings relating to only half the children in the first four grades of school. (Assignments of Error 15, 24-25, R. 124-125, argued Point V, part D, *infra.*)

8. In the face of conflicting evidence as to the interference with the accomplishment of education in the basic school studies and with the health and welfare of children resulting from bilingual instruction of very young children in English and Oriental languages, plaintiff-appellees' witnesses having denied that the normal child suffers such interference, and defendant-appellants' witnesses having testified that such interference exists in all but exceptional instances, it was error for the court to find that in at least 10,000 out of 22,357 cases there is no such interference, this being a finding drawing a line at an arbitrary point, not supported by the evidence on either side. (Assignments of Error 27-29, R. 126, argued Point V, part D, *infra.*)

9. The court erred in holding that the statute deprives parents of the right to have their children taught a foreign language and deprives the plaintiff-appellees of their right to so teach such children, the reasonable regulations of the statute not constituting a deprivation of such rights (Assignments of Error 15, 22, 31, 34, R. 125, 127, argued Point V, part E, *infra*).

10. The court erred in holding the statute wholly unconstitutional and in failing to separately consider each of four severable requirements contained in the statute (Assignments of Error 36-37, 39, 41-42, R. 127-129, argued Point V, part E, *infra.*)

11. The court erred in finding and deciding that plaintiff-appellee Leong Nget Cho was able to secure a contract to teach Chinese at the school owned by the plaintiff-appellee Chung Shan Chinese School Association in 1943, there being no evidence thereof. (Assignment of Error 43, R. 129-130, submitted as not requiring argument).

## SUMMARY OF ARGUMENT

Defendant-appellants' argument first considers the jurisdiction of the three-judge court, as such, and the appellate jurisdiction of this Court, admitting that grave doubts exist as to the right of direct appeal to this Court, but urging that if the direct appeal does not lie, then the appeal taken to the Court of Appeals for the Ninth Circuit does lie, and that in such event, this Court entertain the case upon the petition for certiorari to the Court of Appeals before judgment, which also is pending in this Court. This is Point I of the argument.

The argument then proceeds to take up the specification of errors. In Point II the jurisdiction of the

court is considered in relation to the amount in controversy, and it is submitted that the plaintiff-appellee school corporations failed to show that as to each of them the matter in controversy exceeds $3,000, exclusive of interest and costs. This point covers Assignments of Error 3-6 and 34; Specification of Error No. 1.

In Point III it is submitted that plaintiff-appellees failed to state a cause of action for equitable relief or for declaratory relief, and that defendant-appellants' motion to dismiss should have been granted. This point covers Assignments of Error 1, 2, and 7-9; Specification of Error No. 2.

Point IV analyzes the opinion of the lower court, showing that invalidation of the territorial statute was in contravention of the doctrine of deference to local courts in the interpretation of their own statutes, the companion doctrine of abstention in deciding on the constitutionality of statutes, and the case and controversy rule. This point covers Assignments of Error 10-13, 15, and 21; Specifications of Error Nos. 3 and 4.

Point V is directed to the merits of the case. We submit that the statute represents an exercise of the police power within the legislature's prerogatives. The argument covers Assignments of Error 14-29, 31, 34, and 36-42. Part A of Point V submits that the statute represents an exercise of the Territory's power as parens patriae, in the same field as the compulsory education laws, being directed to the prevention or minimization of the handicap to a child in his accomplishment of education in the basic school studies, imposed by too early simultaneous study of English and oriental languages. This part covers Specification of Error No. 5.

In parts B and C of Point V we submit that, the statute being for the protection of children from a handicap put upon them by too early bilingual instruction, the Territory has the power to protect the children from this handicap even though the parents may favor such early bilingual instruction, and the clear and present danger rule does not apply in the present case any more than it applied in *Prince* v. *Massachusetts*, 321 U.S. 158; that although there was a conflict in expert opinion as to the harmfulness of simultaneous study of English and oriental languages by extremely young children, it was for the legislature, not the courts, to resolve this conflict, under the usual rules of presumption of constitutionality. These parts cover Specification of Error No. 6.

Further analyzing the lower court's opinion and its findings, and in further support of Specification of Error No. 3 as well as in support of Specification of Error No. 7, we submit in Part D of Point V that the legislature made findings referring to the general run of children, that the statute is free from the defect created in it by the construction put by the lower court upon the words "children of average intelligence" used in one place in the legislative findings, which the lower court divorced from the context and from the statute as a whole, interpreted to mean "children of mean average intelligence", and thereby attributed to the legislature the intent to cover in its findings only half of the area covered by the general body of the statute.

Part D of Point V further shows that the testimony of the witnesses on both sides related to the general run of children, not to one half of the children divided by the line of mean average intelligence; therefore,

the court's finding that in at least 10,000 out of 22,357 cases there is no interference with the accomplishment of education in the basic school studies resultant from bilingual instruction of very young children in English and oriental languages, is not supported by the testimony on either side, but on the contrary draws a line at an arbitrary point selected by the court. This part of the argument covers Specification of Error No. 8.

Part E of Point V submits argument to show that the burdens imposed by the statute on schools and parents are negligible, and that such slight restrictions are fully justified by the need to relieve the children of the Territory from the handicap put upon them by too early bilingual studies. This part of the argument is in further support of Specification of Error No. 5, and covers Specification of Error No. 9.

In further support of Specification of Error No. 3 we also submit in part E of Point V that the requirements of the statute, when properly interpreted, are reasonably directed to meet the evil found by the legislature and upon which the statute is based, hence that the statute meets the tests of constitutionality on this score as well, but if our interpretation of the statute is disputed by plaintiff-appellees, then the correctness of the interpretation is a matter that properly should be tried in an enforcement proceeding brought in a territorial equity court. Thus as submitted in Specification of Error No. 3 the primary issue in the case, which the lower court failed to dispose of, is whether or not the territorial legislature was within its constitutional powers when it sought to defer simultaneous instruction in English and Chinese to a point (fixed at the completion of the fourth grade) when English is suf-

ficiently mastered to enable the child to undertake, without injurious results, intensive study of Chinese in a school devoted to that purpose.

Part E of Point V further submits that there are four severable requirements contained in the statute, one of which is not even challenged. The statute cannot be invalidated as a whole; invalidation of any one of the four requirements would not invalidate any of the others. This part of the argument covers Specification of Error No. 10.

## ARGUMENT

### I. Jurisdiction of the Three-Judge Court; Appellate Jurisdiction

Appellants admit that grave doubts exist as to the right to direct appeal to this Court; this was conceded in their jurisdictional statement. If the direct appeal does not lie then the appeal taken to the Court of Appeals for the Ninth Circuit does lie, and in that event we urge this Court to entertain the case upon the pending petition for certiorari to the Court of Appeals before judgment.

If the direct appeal does not lie it will be on one or more of three issues below reviewed: (1) whether the case in any event was a proper one for a three-judge

court; (2) whether under the law governing this case a direct appeal to this Court could be had from any court in Hawaii: and (3) whether section 266 of the Judicial Code was adopted and made applicable to the United States District Court for the District of Hawaii by the Hawaiian Organic Act.

The below discussion of these three issues includes and supplements the material in part K of Appellants' jurisdictional statement previously filed to which no further reference will be necessary.

(1) WHETHER THE CASE IN ANY EVENT WAS A PROPER ONE FOR A THREE-JUDGE COURT.

Since the application for a preliminary injunction was disposed of by a single judge in the original complaint (R. 47), and not renewed before the three-judge court on the amended complaint, other than by a prayer for such relief (R. 56, 63), which was not pressed before such three-judge court, the case then being set for final hearing (R. 136), the question arises whether, irrespective of the question of applicability of section 266 in the Territory of Hawaii (on which the members of the three-judge court differed) the case in any event was a proper one for a three-judge court. *Moore* v. *Fidelity and Deposit Co.*, 272 U.S. 317; *Smith* v. *Wilson*, 273 U.S. 388; *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U.S. 10; *Healy* v. *Ratta*, 289 U.S. 701; *McCart* v. *Indianapolis Water Co.*, 302 U.S. 419, 420. This proposition has apparently been rendered of no importance under the revised Title 28 of the United States Code, section 2281 of which provides for a three-judge court whether or not an interlocutory injunction is sought. We urge the Court not to rest its decision on this ground alone.

(2) WHETHER UNDER THE LAW GOVERNING THIS CASE A DIRECT APPEAL TO THIS COURT COULD BE HAD FROM ANY COURT IN HAWAII.

Section 128 of the Judicial Code (28 U.S.C.A. 225) provided that the circuit courts of appeal should have appellate jurisdiction to review final decisions in the United States District Court for Hawaii in all cases. This was in contradistinction to their appellate jurisdiction over district courts generally, which did not lie where a direct review of the decision might be had in this Court under section 238 of the Judicial Code (28 U.S.C.A. 345). This distinction was made by the Act of February 13, 1925, 43 Stat. 936, c. 229, which also provided in section 13 for repeal of "so much of the Hawaiian Organic Act, as amended by the Act of July 9, 1921, as permits a direct review by the Supreme Court of cases in the courts in Hawaii." Previously, since 1909, section 86 of the Hawaiian Organic Act had contained a specific provision that "appeals may be taken to the Supreme Court of the United States from said district court in cases where appeals are allowed from the district courts of the United States to the Supreme Court * * *" (35 Stat. 838; 42 Stat. 119).

The question arises whether the Act of February 13, 1925 required that the appeal in this case be taken to the circuit court of appeals, rendering inapplicable in any event that part of section 266 which provided for direct review, irrespective of the applicability of that part of section 266 which provided for a three-judge court. Appellants took a direct appeal to this Court on the assumption that the holding by the trial court was that all of section 266 applied.

The question above submitted does not arise under the revised Title 28 of the United States Code, section 1291 of which places appellate jurisdiction over the district court for Hawaii on the same basis as any district court, the special and different provision for Hawaii having been eliminated. Therefore if the three-judge court procedure is applicable in Hawaii (part (3) infra) a direct appeal will lie in subsequent cases, if not this one. In the present case the matter in any event can be entertained by issuance by this Court of certiorari before judgment.

(3) WHETHER SECTION 266 OF THE JUDICIAL CODE WAS ADOPTED AND MADE APPLICABLE TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII BY THE HAWAIIAN ORGANIC ACT.

Section 86 of the Hawaiian Organic Act (48 U.S.C.A. 641-642, 643-645, Appendix II), at all times since its original enactment (31 Stat. 141, c. 339) has provided, and still with slightly different wording,[1] provides, that:

> "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."
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> 48 U.S.C.A. 645, Appendix II

Said section 86, prior to the enactment of Title 28 of the United States Code and when this case was decided below, also provided that the laws relating to juris-

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[1] Infra, p. 22.

diction of district courts of the United States and the manner in which they proceed should govern the court created by said section 86 (48 U.S.C.A. 642, Appendix II). This part of section 86 was deleted upon the enactment of Title 28 of the United States Code for reasons below set forth.

In general terms section 5 of the Hawaiian Organic Act (48 U.S.C.A. 495) provided and still provides that: "The Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; * * *".

When this case was decided by the district court the applicability of section 266 of the Judicial Code turned on the question whether it was such a law as was adopted by the provisions of sections 5 and 86 of the Hawaiian Organic Act, above set forth. We submit that it was such a law, and that Congress by its treatment of the United States District Court for the District of Hawaii in enacting Title 28 of the United States Code has spelled out its previous adoption by reference, thereby demonstrating its understanding that it created this court, albeit a legislative court, with the same jurisdiction and procedure in all respects, including that at issue, as constitutional district courts. This is more fully developed below.

One of the purposes of section 266 of the Judicial Code was to make interference by interlocutory injunction with state legislation a matter for the adequate hearing and full deliberation which a court composed of three judges is likely to secure. *Stratton* v. *St. Louis*

*Ry. Co., supra.*[2] The statute sought "procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy." *Phillips* v. *United States*, 312 U.S. 246 (1941). The statute therefore was based upon avoidance of needless friction with state policies, hence was based on the same principle which leads the federal courts to defer to the final authority of a state court to interpret statutes of the state. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). This court has said that the federal district courts are to defer to the territorial courts in such matters *De Castro* v. *Board of Commissioners*, 322 U.S. 451, 459 (1944), discussed *infra*, Point IV.

That Congress intended to establish in the Territory of Hawaii, between the federal court created by the Hawaiian Organic Act and the system of territorial courts then existing and substantially by that act perpetuated, the relation which exists between the courts of the United States and the state courts in the various states, was held soon after the enactment of the Hawaiian Organic Act. *Wilder's S. S. Co.* v. *Hind*, 108 Fed. 113, 114-115 (C.C.A. 9th, 1901), aff'd 183 U.S. 545. This principle became established in a series of cases holding that the federal rule against interference by habeas corpus with the proceedings of state courts is equally applicable in the Territory of Hawaii. *In re Marshall*, 1 U.S.D.C.Haw. 34 (1900); *In re Atcherley*, 3 U.S.D.C.Haw. 404, 421 (1909); *Soga* v. *Jarrett*, 3 U.S.D.C.Haw. 502, 506 (1910); *In re Curran*, 4 U.S. D.C.Haw. 730, 738 (1916). Other cases relying on the same principle are *United States* v. *Bower*, 4 U.S D.C.Haw. 466; *Yeung* v. *Territory*, 132 F. 2d 374, 378 (C.C.A. 9th, 1942).

[2] 282 U.S. 10

Such judicial pronouncements as to the autonomy of the territorial system of courts in Hawaii are confirmed by the legislative history of the Hawaiian Organic Act. Hawaiian Commission Message, Sen. Doc. No. 16, 55th Cong., 3d Sess., pp. 162-164; H. R. Rep. No. 305, p. 19, of Committee on Judiciary on H. R. 2972, 56th Cong., 1st Sess., which bill was later incorporated by the House into Sen. 222, the Hawaiian Organic Act (see H. R. Rep. No. 549, 56th Cong., 1st Sess.); 33 Cong. Rec. 1871, 1929, 1932-1934, 2025, 2123-2124, 2133, 2189, 2191-2194, 2388-2389, 2397, 2398-2400, 2441, 3771, 3801, 3859, 4358, 4649, 4733. The autonomy of the territorial courts is part of the congressional scheme for the territorial government, which it created as a sovereign government, none the less so because Congress may intervene in its affairs.[1]

This Court has said that an adoptive statute, such as the section of the Organic Act above quoted, embraces subsequent changes in the law adopted "that are not obviously inapplicable". *Balzac* v. *Porto Rico*, 258 U.S. 298, 302 (1922); to the same effect, *In re Maret*, 145 F. 2d 431, 436, note 28 (C.C.A. 3d 1944); cf. *Mookini* v. *United States*, 303 U.S. 201, 205. The law on this subject is examined in 2 Sutherland on Statutory Construction, 3d ed. secs. 5207-5208, pp. 547-551; 168 A.L.R. 627 (1947). Adoptive statutes are classified as of general or specific reference, the former referring to the law of a subject generally, and

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[1] Supporting the sovereignty and autonomy of the territorial government are: *Kawananakoa* v. *Polyblank*, 205 U.S. 349, 353; 33 Cong. Rec. 1871, 1929, 1932-1934, 2025, 2123-2124, 2133, 2189, 2191-2194, 2388-2389, 2398-2400, 2441.

including all amendments and modifications of that law subsequently enacted. The adoptive provisions of the Organic Act are of this general reference type; cf. specific reference statute considered in *Hassett* v. *Welch*, 303 U.S. 303, 314 (1938).

The principles governing adoptive statutes perhaps were overlooked in the Puerto Rico cases relating to three-judge courts.[4] In any event the Puerto Rico insular courts do not have the same historical autonomous position as do the courts of the Territory of Hawaii.

Section 266 of the Judicial Code, though appropriate to Hawaii in its purpose to avoid hasty and ill con-

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[4] *Porto Rico Light & Power Co.* v. *Colom*, 106 F.2d 345 (C.C.A. 1st 1939), cert. denied 308 U.S. 617. *Benedicto* v. *West India & Panama Telegraph Co.*, 256 Fed. 417 (C.C.A. 1st 1919). *Munoz* v. *Porto Rico Light & Power Co.*, 83 F.2d 262 (C.C.A. 1st 1936), cert. denied 298 U.S. 689, the Circuit Court of Appeals citing *Kendall* v. *United States*, 12 Pet. 524, 625, and *In re Heath*, 144 U.S. 92, but not *Balzac* v. *Porto Rico*, *supra*. The *Kendall* case seems to have assumed that the principle governing adoption of laws of other jurisdictions (e.g., British) also governed the adoption of laws of the same jurisdiction, overlooking the competence of a legislative body to state its general intent that all future laws enacted by it in a given field shall apply to the matter before it. Not until the *Balzac* case in 1922 and *Panama R.R.Co.* v. *Johnson*, 264 U.S. 375, 391, decided in 1924, was the true nature of a general reference statute recognized. The last cited case concerned a general reference statute which has been held to incorporate later amendments: *Chisholm* v. *Cherokee-Seminole S.S.Corp.*, 36 F.Supp. 967 (D.C.S.D.N.Y. 1940); *Gahling* v. *Colabee S.S.Co.*, 37 F.Supp. 759 (D.C.E.D. Pa. 1941); *Streeter* v. *Great Lakes Transit Corp.*, 49 F.Supp. 466 (D.C.W.D.N.Y. 1942).

sidered interference with respect to statutes of the Territory, possibly was rendered partially inappropriate in Hawaii by the Act of February 13, 1925 repealing "so much of the Hawaiian Organic Act *** as permits a direct review by the Supreme Court of cases in the courts in Hawaii" (par. 2, *supra*). But even if a direct review was not allowable under the law governing this case, the provision for a three-judge court still was appropriate. Review by a Circuit Court of Appeals of a decision of a three-judge court is not unheard of. *Healy* v. *Ratta*, 67 F.2d 554 (C.C.A. 1st 1933), reviewed 292 U.S. 263; *Wilentz* v. *Sovereign Camp*, 306 U.S. 573 (1939); *Phillips* v. *United States*, 312 U.S. 246, 254; cf. *Query* v. *United States*, 316 U.S. 486. In *Smith* v. *Wilson*, *supra*,[1] this court left open the possibility that it is not erroneous for three judges to sit even when the appeal must be to the Circuit Court of Appeals. In Hawaii a three-judge court apparently is the method provided for review of an order of the Interstate Commerce Commission, pursuant to the Act of October 22, 1913, 38 Stat. 220, c. 32, abolishing the Commerce Court (now sections 1253, 1336, 2101, 2284, 2321-2325 of Title 28 of the U. S. Code), yet an appeal to the Circuit Court of Appeals may have been required by the 1925 Act, *supra*, prior to enactment of Title 28 of the United States Code.

The treatment of the United States District Court for the District of Hawaii in the revision of Title 28 of the United States Code enacted by Public 773, 80th Cong., 2d Sess., c. 646, sustains the applicability of the three-judge court procedure in the Territory of Hawaii. That a legislative body's interpretation of its own laws

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[1] 273 U.S. 388

is a direction to courts in expounding the provisions of the law, was early held by this Court. *Alexander* v. *Alexandria*, 5 Cranch 1, 3 L. Ed. 19. The rule is that if a subsequent act on the same subject affords a complete demonstration of the legislative sense of its own language the subsequent act should be incorporated into the former act.[6]

Public Law 773 which enacted the new Title 28 of the United States Code as section 1 of that Act provides in section 8 that section 86 of the Hawaiian Organic Act is amended to read as follows:

"Sec. 86. The laws of the United States relating to removal of causes, appeals and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

All mention of the establishment of a United States district court for Hawaii and of its jurisdiction and procedure has been thereby eliminated from section 86. This was done because the new Title 28 includes Hawaii as a judicial district in which a United States district court is created in the same manner as all other United States district courts. It therefore was no longer necessary to provide for the creation of this district court in the Hawaiian Organic Act or to direct this district court to follow the procedure and jurisdiction of other district courts.

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[6]See also: *Koshkonong* v. *Burton*, 104 U.S. 668, at pp. 678-679; *First National Bank* v. *Missouri*, 263 U.S. 640, 658; *United States* v. *Bowling*, 256 U.S. 484; 2 Sutherland Statutory Construction (3d ed.) sec. 5110, p. 526.

In recommending this significant change to Congress, the House of Representatives Judiciary Committee in its Report No. 308, 80th Cong., 1st Sess., dated April 25, 1947, in explanation of the bill, H. R. 3214, states:

"Hawaii and Puerto Rico are included as judicial districts of the United States, since in matters of jurisdiction, powers, and procedure, they are in all respects equal to other United States district courts. See sections 91 and 119."

The Congress itself thereby recognized that in its earlier law creating the United States District Courts for the District of Hawaii it had adopted, by reference, the general statutes concerning the powers and procedures of district courts; and in this new enactment Congress spelled out the adoption, assimilating the United States District Court for the District of Hawaii into the genus of district courts.[1] As has been pointed out,[2] the former policy of Congress concerning direct appeal to this Court from Hawaii has been reversed by the reinstitution of provision for direct appeal from

[1] The new Title 28, chapter 5, provides that Hawaii constitutes one judicial district (section 91). Section 132 creates in each judicial district a court which shall be a court of record known as the United States District Court for such district. Chapter 21, being general provisions relating to all courts, opens with section 451, which contains definitions for the whole of Title 28. The United States District Court for the District of Hawaii is specifically included in said section in the term "court of the United States"; the terms "district court" and "district court of the United States" mean the courts constituted by chapter 5 of this Title.

[2] Supra, p. 16.

the district court in Hawaii in the same manner as from any other district court.

Another particularly noteworthy elimination of a difference which formerly existed between the District Court for Hawaii and other district courts, results from the repeal of the Act of August 24, 1937, 50 Stat. 751. Section 5 of that act defined "court of the United States" so as to specifically include all courts of record of Hawaii as courts of the United States, district courts of the United States being separately listed in the definition, with evident reference to the constitutional district courts. This was a deviation from the usual practice; the section 5 definition made section 1 of the 1937 act, relating to intervention by the United States, applicable to the territorial courts, which usually have been treated by Congress as if they were state courts. The section 5 definition apparently made section 3 of the 1937 act (section 380a of the former Title 28) relating to three-judge courts for the granting of injunctions restraining the enforcement of acts of Congress, not applicable in the District Court for Hawaii.[9]

The new definition of "court of the United States"[10] causes section 2403, relating to intervention by the

[9] The adoptive provisions of the Hawaiian Organic Act would have caused this section to apply were it not for the lumping of all courts of record of Hawaii into one class (section 5 of the 1937 act), contrary to the usual practice of segregating territorial courts from the District Court for Hawaii. This treatment mitigated against the applicability of section 3 of the 1937 act (section 380a of the former Title 28), just as the background of the Rules of Civil Procedure mitigated against their applicability in Hawaii (*Mookini* v. *United States*, *supra*, 303 U.S. 201, 205) until they were made applicable by a special statute.

[10] Section 451 of the new Title 28.

United States, not to apply in the territorial courts, thereby restoring the usual practice. The new definition, taken with the definition of "district court",[11] causes section 2282, relating to three-judge courts for the granting of injunctions restraining the enforcement of acts of Congress, to apply in the District Court for Hawaii. Hence, Congress does not consider that distance is an obstacle to the convening of a three-judge court in Hawaii.[12] Another example of a three-judge court in Hawaii occurs under section 2325 of the new Title 28, relating to injunctions restraining the enforcement of orders of the Interstate Commerce Commission. Likewise the new provisions concerning three-judge courts contained in sections 2281 and 2284 apply to the district court for Hawaii as a "district court of the United States" by statutory definition. Hence it no longer is necessary for a court to decide the appropriateness to the District Court for Hawaii of the provisions governing the constitutional courts. The

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[11]Section 451 of the new Title 28.

[12]The general doctrine enunciated in *Phillips* v. *United States*, *supra*, 312 U.S. 246 (1941), was that section 266 of the Judicial Code (section 380 of the former Title 28, here involved) should be construed to avoid "a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice." These principles were applied to the district court in Hawaii by the dissenting judge in the three-judge district court below as reasons why section 266 was not deemed to have been adopted by Congress to govern procedure in the district court in Hawaii. The new Title 28 shows that the desire of Congress to avoid serious drain on the federal judicial system was overemphasized by the dissenting judge.

District Court for Hawaii remains a legislative court[11] but Congress has so exercised its legislative powers in the new Title 28 as to resolve for the future all questions concerning the applicability to this court of statutes governing district courts generally.

The only issue which Congress did not specifically settle by the enactment of the new Title 28 is whether or not the Territory of Hawaii was included in the word "state" as used in the new Title 28. That Congress necessarily included the Territory within the word "state" throughout the new Title 28, follows from the fact that otherwise there would be glaring omissions in the statutory provisions for the District Court for Hawaii and notable differences between it and other district courts in jurisdiction, powers and procedure. But as already shown,[12] the District Court for Hawaii was intended to be in all respects equal to other district courts and in the new Title 28 Congress eliminated such differences as formerly existed between them.

To exemplify the use of the word "state" in the new Title 28 as including "territory":

Among the general procedural provisions of the new Title 28, section 1652 requires district courts to regard the laws of the several *states* as rules of decision in civil actions in cases where they apply. As section 725 of the former Title 28 has always applied in Hawaii and without such provision the court would be hopelessly at sea, it is apparent that "territory" must be included in the word "state" in the new section. In section 2410 provision is made for the

[11] *Mookini v. United States, supra*, 303 U.S. 201.
[12] Supra, p. 23.

foreclosure of liens on property on which the United States has or claims a lien. Such foreclosure suit may be brought in any district court or "state court". The revisers' notes show particular awareness of the applicability of this section in Hawaii, yet it was not felt necessary to define the word "state" to include "territory".

In section 1343, as below noted,[15] two of the three paragraphs describe the scope of the jurisdiction thereby conferred by referring to section 47 of Title 8, which specifically applies in the territories, yet the third paragraph of section 1343 continues to use the word "state", undoubtedly on the assumption that it includes "territory", that word being specifically included in such laws as section 43 of Title 8, to which the third paragraph of section 1343 generally (but not by citation of the statute in this instance) refers.

Other examples are given in the footnote.[16]

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[15]Infra, p. 31.

[16]It is provided in section 1348 that national banking associations shall be deemed citizens of the states in which they are respectively located; section 1861 excludes from jury service persons incompetent to serve in state courts; section 1961 makes the levy of execution for the collection of interest on judgments a matter dependent on state law; section 1962 makes the extent of judgment liens dependent on state law; section 2005 makes the appraisal of goods taken on execution dependent on state law; section 2007 abolishes imprisonment for debt where abolished by state law (in the case of the Territory of Hawaii imprisonment for debt was abolished by section 10 of the Hawaiian Organic Act, 48 U.S.C.A. 501). In all such provisions the word "state" must have been intended to include "territory".

Chapter 89 of the new Title 28, section 1441 et seq., concerning removal of causes, has not been cited in the

The only definition of the word "state" found in the new Title 28 is in section 1332, providing for jurisdiction of district courts based on diversity of citizenship. Here a specific definition of "State" as including Territories and the District of Columbia was advisable because of the provisions of the Constitution, Article III, section 2, concerning diversity of citizenship. Congress no doubt thought it desirable to make it clear that it was using the word "state" in a broader sense than that word was used in the constitutional provision. The existence of an earlier statute[17] defining the word "state" for diversity of citizenship purposes made it important to include a definition in this part of the code; otherwise the repeal of the 1940 Act[18] might have

foregoing examples because, irrespective of the meaning of the word "state" therein, there exist in section 86 of the Hawaiian Organic Act (48 U.S.C.A. 645, Appendix II) as amended by Public 773, 80th Cong., 2d Sess., enacting the new Title 28, provisions adopting such removal provisions by reference. Hence the applicability of the removal provisions does not depend on the meaning of the word "state". Many other laws, which relate to the relations between the courts of the United States and the courts of the several states have been omitted from the examples given, for the same reason. We deem sections 2281 and 2284, relating to three-judge courts, to be laws which relate to the relations between the courts of the United States and the courts of the several states.

It is the usage of the word "state" as including "territory" even in the sections of the new Title 28 not covered by the adoption provisions contained in the amended section 86 of the Hawaiian Organic Act, that we consider particularly noteworthy.

[17] Act of April 20, 1940, 54 Stat. 143, c. 117.

[18] It was repealed by the act enacting the new Title 28.

indicated an intent to narrow the meaning of the word "state" for diversity of citizenship purposes.

This Court has found no difficulty in rejecting the contention that the phrase "laws of the state" in an act of Congress should be limited to the forty-eight states, where the consequence would have been that there was no provision for the method of inflicting the death penalty when imposed by a district court sitting in a territory. *Andres* v. *United States*, 333 U.S. 740, decided April 26, 1948. The court stated "in many contexts 'state' may mean only the several states of the United States. Here, however, we hold that its meaning includes the Territory of Hawaii."

It is submitted that this Court should hold that when this case was decided by the three-judge district court, section 266 of the Judicial Code had been adopted to govern the United States District Court for the District of Hawaii by general reference in the Hawaiian Organic Act, and that Congress by its treatment of the United States District Court for the District of Hawaii in the new Title 28 of the United States Code has recognized its earlier adoption by reference of procedural statutes such as section 266. The use of the word "state" in sections 2281 and 2284, the relevant provisions in the new Title 28, interposes no obstacle.

## II. Jurisdiction Considered in Relation to the Amount in Controversy; the Appellee School Corporations Failed to Show that as to Each of Them the Matter in Controversy Exceeds $3,000, Exclusive of Interest and Costs.

(This point covers Assignments of Error 3-6, and 34; Specification of Error No. 1.)

Preliminarily the Court may wish to review on its own motion the lower court's ruling as to the necessity of establishing a jurisdictional amount.

It is beyond question that the plaintiff school corporations must establish a jurisdictional amount, under the rule of *Hague* v. *C.I.O.*, 307 U.S. 496, at p. 514. As to the appellee school teacher, Leong Nget Cho, it was stipulated that the jurisdictional amount was established (R. 101). But the court below dismissed the action as to the two parents, Wah Chan Thom and Wilfred Chong, because of lack of proof of the jurisdictional amount; they are not appellants here, yet because of what we feel was a lack of consistency in the lower court's decision, we call to this Court's attention that the lower court, by a majority of two, deemed section 266 of the Judicial Code applicable in the Territory, notwithstanding the use therein of the word "state", but held that paragraph 14 of section 41, former Title 28 of the U.S. Code (section 1343(3) of the newly enacted Title 28) did not apply because of the use therein of the word "state".

This construction of paragraph 14 of section 41 of the former Title 28 was not followed in *Alesna* v. *Rice*, decided by the District Court for Hawaii, a single judge sitting, 74 F. Supp. 865, appeal pending in the Court of Appeals for the Ninth Circuit; in the *Alesna* case both the Territory and the petitioner took the position that paragraph 14 of section 41 of the former Title 28 did apply in the Territory of Hawaii, and in the present case the holding that it did not apply was on the court's own motion. The only other case coming to our attention in which section 41(14) of the former Title 28 has been considered in a territory is *Insular Police Commission* v. *Lopez*, 160 F. 2d 673 (C.A. 1st 1947)

cert. den. 331 U.S. 855; this case gives some support to the opinion of the lower court in the instant case.

The dismissed plaintiffs were joined as parties by an amended complaint, in which they relied upon 8 U.S.C., section 43, as well as other provisions. Said section 43 of Title 8, U.S.C., does include the word "territory", although paragraph 14 of section 41 of the former Title 28 did not. In the newly enacted Title 28 the comparable section 1343, while not specifically mentioning the word "territory", does contain two paragraphs, (1) and (2), which relate to the action for damages allowed by section 47 of Title 8, where the word "Territory" specifically is included. However, paragraph (3) of said section 1343 of the new Title 28 resembles the former paragraph (14), of section 41 of the old Title 28.

For the convenience of the Court we are including as Appendix III of this brief the legislative history of section 43 of Title 8 of the U.S. Code and of section 41 (14) of the former Title 28, which was in effect when this case was decided below. Our conclusion is that paragraph 14 of section 41 of the former Title 28 did apply in the Territory of Hawaii, as held in *Alesna* v. *Rice, supra.*

As to the appellee school corporations which necessarily must establish the jurisdictional amount, irrespective of the applicability in the Territory of Hawaii of paragraph 14 of section 41 of the former Title 28, U.S. Code, it is submitted that the court erred in finding the jurisdictional amount.

Appellee school corporations introduced evidence, and appellants stipulated to certain facts showing the numbers of pupils in the first four grades of their

schools prior to the close of the schools in December 1941, and showed further the amounts of money received as tuition fees from such pupils (R. 430, 457-461, 465, 466.). These figures cannot be regarded as evidence of loss or damage, as the mere reading of the law indicates that in no sense will the first four grades of the school be eliminated, and that it is entirely possible and even probable that a comparable number of students will be available for attendance in the first four grades, the only difference being that such students will be in attendance in the upper four grades of the public and private schools of the Territory, whereas prior to 1941 many of them would generally have been in the first four grades of their regular schooling. This proposition is substantiated by the fact that as of the time the original complaint in this case was filed all teaching of Chinese language, and all school operations of the appellee corporations, had been suspended for a period of almost exactly five years (R.471, 479). Hence it would be simple for the schools to start their first grade instruction with fifth grade children. This is further substantiated by the testimony of the two parents who had been joined as plaintiffs in the amended complaint, both of whom testified that they had daughters thirteen years of age and in the seventh grade of their regular schooling and these children would have to start in the first grade when the language schools should reopen. (R.172, 191.)

It is well established that in a suit to prevent interference with a business, the measure of the amount in controversy is the value of the right to do business without such interference. *McNutt* v. *General Motors*, 298 U.S. 178. At the outset then, appellees failed to establish any case involving the loss of $3,000, without

affirmatively showing that the first four grades of their schools would actually be eliminated, this being a showing they have not attempted to make except by remote inference.

Similarly, the appellee school corporation alleged that their staffs of teachers would be disorganized by enforcement of the law requiring certification of such teachers by a board of examiners. (R.9, 18-19.) This allegation utterly fails to establish any loss or damage unless it is accompanied by an affirmative showing that no other teachers who could be certified by a board of examiners were available. There was no attempt to make such showing.

## III. Appellees Failed to State a Cause of Action for Equitable Relief or for Declaratory Relief; Appellants' Motion to Dismiss Should Have Been Granted.

(This point covers Assignments of Error 1, 2, 7-9; Specification of Error No. 2.)

As noted in Points I and IV hereof, the relationship between the federal court in Hawaii and the territorial courts is, for all practical purposes, identical with that existing in the continental United States between federal courts and state courts.

It is the position of appellants that neither the complaint nor the amended complaint contained allegations sufficient to entitle appellees to injunctive relief. A decisive reason for denying equitable relief lies in the rule that a federal court will not enjoin the enforcement of a state law where the state law itself affords a means of presenting contentions as to unconstitutionality of the statute. The rule was stated

by Mr. Justice Frankfurter in "The Federal Courts", 1929, 58 New Republic 273, 275 and quoted in a note in 43 Harv. L. Rev. at page 378:

> " 'The federal courts entertain jurisdiction in these suits because the states do not provide adequate remedies through their own courts. The legal procedure of the states has not accommodated itself sufficiently to the consequences of their regulatory legislation, so that the validity of new legislation, or the application of old, cannot be questioned in the state courts without running serious risks. The states could prevent interference with their tax collections through suits in the federal courts, by removing any chance for the claim that there is no adequate remedy at law in the state courts, if the tax is paid. So, also, with appropriate changes in the criminal administration of the states, there would be no excuse for seeking injunctions in the federal courts, or claims that the multiplicity of suits causes irreparable damages and oppressive penalties before final settlement, in the state courts, of the validity of contested state action. Congress has already given the states a lead in this direction; but they have not followed it. The states' failure to use their power to sift state legislation in their own courts has needlessly swollen the business of the federal courts, and cast upon the Supreme Court some of its most burdensome labor.' "

This rule is well established both when the state law operates in civil courts and in criminal courts of the state. In *Cavanaugh* v. *Looney*, 248 U.S. 453, involving an action to enjoin state officials from filing condemnation proceedings under an allegedly unconstitutional law, this Court held that all issues could be settled in the state suit, and that the trial court properly denied a preliminary injunction. The case of *Northport Power & Light Co.* v. *Hartley, Governor*

*of Washington*, 283 U.S. 568, involved an action to enjoin the bringing of a suit to forfeit land on account of alien ownership, under an allegedly unconstitutional statute. It was held that no sufficient grounds for equitable relief were shown, as the rights of the plaintiffs could be protected as well in the state court proceedings.

This Court has often and consistently held that the power of granting injunctive relief against the enforcement of an allegedly unconstitutional state law should not be exercised "unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury." Among the more recent cases restating and emphasizing that principle are the following: *Douglas* v. *Jeannette*, 319 U.S. 157; *Watson* v. *Buck*, 313 U.S. 387; *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, at pp. 95 and 96, holding that the danger of irreparable loss must be both "great and immediate"; *Toomer* v. *Witsell*, 334 U.S. 385 (decided June 7, 1948); *American Federation of Labor* v. *Watson*, 327 U. S. 582. Among the earlier cases are *Terrace* v. *Thomson*, 263 U.S. 197; *Ex parte Young*, 209 U.S. 123; and *Truax* v. *Raich*, 239 U.S. 33.

Examination of these decisions establishes clearly that each case must rest upon its own factual situation, as to whether the circumstances of great and immediate danger of irreparable injury are sufficiently and properly alleged and proved. In the *Truax*, *Terrace* and *Toomer* cases, injunctive relief was granted because there were no sufficient means of testing the validity of the statutes without running great risk of irreparable injury. In the *Douglas* and *Watson* v. *Buck* cases, injunctive relief was denied because there was no such risk.

In the case at bar, appellees have never been faced with any risk except the action of a court of equity (R. 40). The territorial statute provided for its enforcement in a court of equity of the Territory. (Appendix I, s. 6.) The prayer for equitable relief therefore involved the novel, if not anomalous, proposition that one court of equity should enjoin, as an irreparable injury, action in another court of equity.

The appellees could not be endangered in any way as to liberty or property unless and until they were to be enjoined from violating the statute's regulations. Before they could be so enjoined there would be a hearing and a determination of the constitutionality of the statute. The appellees ran no risk of cumulative fines or penalties or forfeiture of any property; yet the presence of some such risk has repeatedly been held a prerequisite to the granting of the relief prayed for and which, we believe erroneously, was granted by the three-judge district court.

The findings and ruling of the single United States district judge in his order denying the preliminary injunction sought by the original complaint, were essentially a dismissal of the action because of failure of appellees to establish a claim for equitable relief, although the court did not at that time do more in its order than deny the application for the preliminary injunction. The order contained these important conclusions of law:

> "6. Federal courts are hesitant to enjoin the enforcement of the laws of a state, and no injunction ought to issue against officers of a state clothed with authority to enforce the law in ques-

tion unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.

7. The law involved carries no criminal penalties for infractions. Enforcement is in equity in the circuit courts of the Territory. Plaintiffs have no reason to fear a court of equity, and there is every reason to believe that their constitutional rights would be fully protected in the equity courts of the Territory and that an appeal, if need be, eventually could be had to the United States Supreme Court."

(R. 49)

Subsequently, the motion to dismiss the original complaint came on for hearing before a single judge, not the same one who heard the application for the preliminary injunction. The motion was based on the "defenses in law" set forth in the answer to the original complaint (R. 21-23). The motion was denied without opinion (R. 116).

The "defenses in law" set forth in the answer to the amended complaint (R. 64-66) were before the three-judge court, to whom the amended complaint and answer thereto were presented.[19] The three-judge court simply adopted as its own the earlier action of the single judge who ruled against dismissal of the action, the parties having stipulated that the proceedings before this single judge should be deemed to have been before the three-judge court (R. 76).

Thus the only one of the judges below who stated any reasons for his ruling as to the adequacy of the

[19]The defenses in law, without a motion, were sufficient to raise the question whether the amended complaint stated a cause of action. (F.R.C.P., Rule 12)

claim for equitable relief was the first judge above quoted (R. 49), and his opinion supported the contentions here made.

The prayer for declaratory relief, having made its first appearance in the amended complaint, was not considered by any of the lower court judges, the three-judge court to which it was first presented having adopted as its own the conclusion that the complaint stated a sufficient claim to equitable relief, hence not having had occasion to consider the sufficiency of the claim to declaratory relief.

Compelling reasons exist for the denial of the prayer for declaratory relief. It is well established that declaratory relief is not an avenue to equitable relief for which there is no sufficient showing: *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, *Spence* v. *Cole*, 137 F.2d 71; *Whisler* v. *City of West Plains*, 137 F.2d 938. Nor is declaratory relief, as the authorities cited in connection with the doctrine of abstention show, an avenue to submission of a hypothetical case. The present case is a clear one for application of the doctrine of abstention (Point IV, *infra*). Actual operation of the schools and actual administration of the statute (which would have obtained had the test of constitutionality come in an enforcement proceeding in the territorial equity court), would have taken out of the case the conjectural aspects which governed the lower court's decision. (Point IV, *infra*.)

We concede that if the schools could not open and operate, and thus subject the statute to the test of constitutionality in a state of actuality, in such event

there would be some basis for declaratory relief, though even so such declaratory relief should be sought in the territorial court (Point IV, *infra*). However, this was not such a case. At no time have the appellee school corporations contended that they could not open their schools at all, under the statute. Obviously they could not so contend. The most that was claimed was that they could not operate the schools the way they wanted to, under the statute. That appellees might readily have opened their schools and operated them the way they wanted to in defiance of the statute, pending adjudication of its validity in an enforcement proceeding in the territorial court, is a decisive answer to the claim for declaratory relief as well as the claim for equitable relief.

They cannot be heard to say that to so open their schools in advance of adjudication of the merits of their contentions would involve them in too great a risk of expense, should the adjudication of the merits entail revision of their operating methods. This is amply demonstrated by their eagerness to obtain a preliminary injunction (R. 16). Such preliminary injunction could not constitute a decision on the merits. In so seeking a preliminary injunction, and in still praying in their amended complaint for an injunction pendente lite (R. 63), they showed their readiness and eagerness to hazard the expense of reopening the schools without any assurance as to whether they ultimately would be obliged to abide by the statute. Reopening of the schools pending test of the statute in an enforcement proceeding in equity in the territorial court would constitute no greater risk.

## IV. Invalidation of the Territorial Statute was in Contravention of the Doctrine of Deference to Local Courts in the Interpretation of their Own Statutes, the Companion Doctrine of Abstention in Deciding upon the Constitutionality of Statutes, and the Case and Controversy Rule.

(This point covers Assignments of Error 10-13, 15, and 21; Specifications of Error No. 3 and 4.)

The general rule being that a federal trial court defers to the construction placed on a statute by the court charged with the enforcement of the statute, and judges the constitutionality in the light of that construction, or if the statute has not yet been construed then it will await state court construction before passing on constitutionality,[20] and the courts of the Territory of Hawaii having the same duty of enforcement of territorial statutes as do the courts of a state and holding the same relation to the United States District Court as do the courts of a state,[21] it would follow that the rule of deference to the courts of the Territory in interpretation of territorial statutes should be followed by the United States District Court for the District of Hawaii. Indeed, if that were not the rule the consideration of a case by the Court of Appeals and Supreme Court would vary in accordance with whether the case came up through the territorial courts or came up on appeal from the United States

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[20] *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496; *AFL* v. *Watson*, 327 U.S. 582; *Stephenson* v. *Binford*, 287 U.S. 251, 277; *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101.

[21] Point 1, *supra*.

District Court, and the Court of Appeals and Supreme Court would be in the anomalous position of sustaining a statutory construction in one case because it came up through the territorial courts whose interpretation was not manifestly erroneous,[22] while reversing it in another case because on appeal from the federal court the appellate court undertook to review the statutory construction. The difficulties which this would entail were recognized in *De Castro* v. *Board of Commissioners*, 322 U.S. 451, 459, where this Court held that the federal district court in Puerto Rico was to defer to the local tribunals, where judicial pronouncements of the local tribunals expressed their understanding of matters of local concern. On the authority of the *De Castro* case this Court, in a case arising in Hawaii, *United States* v. *Fullard-Leo*, 331 U.S. 256, 269, again stated that the federal courts were to defer to the decisions of the territorial courts in matters of local law.[23]

No decision has been found specifically concerning the deference to be paid by the United States District Court to the territorial courts with respect to statutes which have not been construed by the territorial courts.

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[22]This would follow from the well-established rule that upon appeal from the highest court of the Territory of Hawaii its construction of territorial statutes will not be disturbed except in case of manifest error. *Waialua Co.* v. *Christian*, 305 U.S. 91, 108; *Ewa Plantation Co.* v. *Wilder*, 289 Fed. 664, 670 (C.A. 9th).

[23]At the same time this Court held that the right of the United States to quiet its title to land claimed by it by virtue of cession from the Republic of Hawaii was a problem of federal law, not exclusively a problem of Hawaiian local law.

But to round out the system established by the decisions above cited, as well as to carry out the direction of Congress that the United States District Court treat the territorial courts as if they were state courts,[24] the District Court necessarily should have the same hesitancy in putting its own construction on a statute and invalidating it on the basis of such construction, as would a federal court sitting in a state.

The doctrine of deference is part and parcel of the doctrine of abstention.[25] The latter doctrine, under which a court will refrain from deciding issues of constitutionality which interpretation of the statute may resolve,[26] is involved in this case. Disregard of the doctrine of abstention, which in some cases is a mere abuse of discretion, in this case goes so far as to violate the case and controversy rule, which governs the justiciability of controversies in a jurisdictional sense.[27]

Whether or not the territorial legislature was within its constitutional powers when it sought to defer simultaneous instruction in English and Chinese to a point (fixed at the completion of the fourth grade) when English is sufficiently mastered to enable the child to undertake, without injurious results, intensive study

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[24]Point I, *supra*.

[25]*AFL* v. *Watson*, 327 U.S. 582, as explained in *Rescue Army* v. *Municipal Court*, 331 U.S. 549, footnote 37 on page 571.

[26]*Musser* v. *Utah*, 333 U.S. 95; *Rescue Army* v. *Municipal Court*, *supra*, 331 U.S. 549, 568; *United States* v. *Petrillo*, 332 U.S. 1, 5; *Federation of Labor* v. *McAdory*, 325 U.S. 450, 460.

[27]*United Public Workers* v. *Mitchell*, 330 U.S. 75, 89, 91; *Rescue Army* v. *Municipal Court*, *supra*, 331 U.S. 549, 570-571.

of Chinese in a school devoted to that purpose, was the primary issue before the court. Secondarily involved was the reasonableness of the qualifications and conditions of the statute, as framed.

The lower court did not decide the primary issue above stated. (R. 112; Con. L. No. 1.) It reviewed the legislative findings contained in the statute and said that defendants had supported by the evidence the legislative finding regarding "average" children. (R. 84.) But the court thought the legislature made this finding as to only one half of the children to whom it applied the enactment. The court reached this result by isolating the word "average" from all the other words used in the findings (section 1 of the statute)[28] and from the statutory provisions concerning the children affected (section 3). The court then placed its own interpretation on the word "average", so as to read "children of average intelligence" as signifying "children of mean average intelligence". (R. 85.) By this means the court arrived at a finding that 10,000 out of 22,357 school children in the first four grades were so brilliant as to be able to undertake bilingual studies without injurious effect (R. 85, 112, Finding 13). The court then held that the statute unjustifiably applied to this upper half of the children. On the sole ground that the legislature intended to

[28]This was in violation of section 10 of the Revised Laws of Hawaii 1945, in effect when the statute was enacted as section 11 of the Revised Laws of Hawaii 1935, reading as follows:

> "Where the words of a law are dubious, their meaning may be sought by examining the context, with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning."

enforce the statute against more children than it had covered in its legislative findings, the court invalidated the whole statute. Whether or not the legislature had the power to apply the statute to *any* children (laying aside the question whether the statute was properly framed to apply only in the area of the evil to be met) the court did not decide. (R. 86.)

That the court's interpretation of the word "average" was erroneous as well as in violation of the deference rule is developed in Point VD of this brief.[29] The Court's Finding No. 13 as to the number of "bright" children rests on this matter of interpretation of the word "average". None of the witnesses supported the 10,000 figure, the witnesses on one side (that of appellees) testifying that generally bilingual studies at an early age produce no injurious results, while the witnesses on the other side (that of appellants) testified that generally bilingual studies at an early age have injurious potentialities. None of them drew the line at one half of all cases. This, also, is developed in Point VD.[30]

To illustrate the violation of the doctrine of abstention resultant from the lower court's approach: Defendant-appellants would construe together all parts of the statute, so as to enforce the statute with respect to the same children who are the subject of the legislative findings. Defendant-appellants thus take the position, and the lower court recognized this was their position (R. 86, last paragraph) that the statute contemplates enforcement, under 3, against the children of average intelligence mentioned in section 1, the

[29]Infra, pp. 81-84.
[30]Infra, pp. 84-89.

legislative findings. "Children of average intelligence" in the legislative findings means the general run of children, excluding the very small percentage of exceptionally brilliant children. These exceptional children are identified in the legislative findings as those who though perhaps only in the third grade, nevertheless are so clearly proficient in English as to attain a test score of 5.0 in standard tests. Children who attain such proficiency are mentioned in the findings as not subject to the injurious results perceived by the legislature with respect to the general run of children who have not passed the fourth grade, and defendant-appellants read this exception into section 3 of the statute where the "equivalent" of passing of the fourth grade is mentioned. (R. 43-44, Defendants' Exhibit 2, admitted R. 427; Assignment of Error 25, R. 125.)

If defendant-appellants are right, then upon the statute being so interpreted by the territorial courts, the entire basis for invalidation of the statute dissolves. The lower court, in deciding the constitutional issue upon its own interpretation of the statute as having no connection between section 1 (findings) and section 3 (children affected), violated the deference rule and the doctrine of abstention.

Out of respect to the lower court, counsel wish to point out that in placing its own interpretation on the statute it relied on a statement of this Court in *Pierce* v. *Society of Sisters*, 268 U.S. 510. (R. 83.) The leading case for the rule as to deference in matters of interpretation[1] having been decided sixteen years later, and having been consistently followed since that

[1] *Railroad Commission* v. *Pullman Co.*, *supra*.

date, this statement in the *Society of Sisters* case requires no further consideration.

Since the lower court did not follow the rule of deference in matters of interpretation it should at least have construed the statute so as to sustain its constitutionality.[32] To this rule the lower court did not advert. Territorial courts follow this rule of construction.[33]

We have submitted that disregard of the doctrine of abstention went so far in this case as to violate the case and controversy rule. The enforcement actually and imminently threatened by the defendants sued, being the officers charged with the admistration of the statute, set the limits of the controversy.[34] Defendants' pleadings (R. 75-76, par. XXVII of answer to amended complaint), Exhibit 2 (R. 43-44, admitted in evidence, R. 427, letter from Department of Attorney General to Department of Public Instruction,

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[32] *Jacobson* v. *Massachusetts*, 197 U.S. 11, 38-39; *Federation of Labor* v. *McAdory*, *supra*, 325 U.S. 450, 470; *Screws* v. *United States*, 325 U.S. 91; *St. Louis S. W. Ry.* v. *Arkansas*, 235 U.S. 350, 369; *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401; *Carey* v. *South Dakota*, 250 U.S. 118, 122; *United States* v. *Walter*, 263 U.S. 15; *Texas* v. *Eastern Texas R. R. Co.*, 258 U.S. 204, 217.

[33] *Territory* v. *Marshall*, 13 Haw. 76, 80; *Territory* v. *Miguel*, 18 Haw. 402, 409, error dism'd 214 U.S. 531; *Bannister* v. *Lucas*, 21 Haw. 222, 223; *Pan-American Airways* v. *Godbold*, 36 Haw. 170, 179, 182.

[34] *Watson* v. *Buck*, 313 U.S. 387, 400, followed in *United Public Workers* v. *Mitchell*, *supra*, 330 U.S. 75, 89, 91; *Ex parte La Prade*, 289 U.S. 444; *Southern Pacific Co.* v. *Conway*, 115 F.2d 746 (C. A. 9th 1940); *Pughe* v. *Patton*, 21 F.Supp. 182 (D.C.N.D.Tex. 1937).

construing law), and answers to questions of the court (R. 136-137, 138, 141-145, 152, 158, 173-178, 233, 242-243) fully disclosed the position of the defendants as to their interpretation and intended administration of the law.

In some respects a position was taken, in answer to questions of the court and out of courtesy to it, on matters not involved in the proceeding, such as what the position of the defendants would be as to employment of a French or Portuguese tutor for three children (R. 137). Such hypothetical questions, injected by the court, might or might not be answered by the territorial court as the defendants have answered them, when and if they actually arose, and in any event are immaterial to this controversy.[35]

Yet the court injected into the case still more of these hypothetical questions after the case was submitted, stating as its interpretation of the law (without knowing whether defendants would so enforce it, should

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[35]The constitutionality of the statute as applied to one not before the court or in a situation not yet arisen should not be considered. *Watson* v. *Buck*, *supra*; *Cronin* v. *Adams*, 192 U.S. 108, 114; *Heald* v. *District of Columbia*, 259 U.S. 114, 123; *Clark* v. *Kansas City*, 176 U.S. 114; *Hatch* v. *Reardon*, 204 U.S. 152; *Ashwander* v. *Valley Authority*, 297 U.S. 288, 324; *Coffman* v. *Breeze Corporations*, 323 U.S. 316, 324; *Territory* v. *Miguel*, *supra*, 18 Haw. 402, 404; *In re Craig*, 20 Haw. 483, 490. A statute may be upheld in its application to the case before the court even though it applies to other cases as to which it is or may be unconstitutional. *Berea College* v. *Commonwealth*, 211 U.S. 45; *Missouri Rate Cases*, 230 U.S. 474, 508.

the question arise, or whether a territorial court would uphold them in doing so) that the statute would apply to the teaching of the truths of Confucius by the cousin of a Chinese mother, the court assigning this as an objection to the law (R. 80).

We have set forth in Point VE our interpretation of the law, in so far as material, for the purpose of showing that in all reasonable probability the actual administration of the law will not prove unduly, if at all, burdensome. Whether the defendant-appellants' interpretation is correct, should that interpretation be disputed, is a matter that properly should be tried in an enforcement proceeding brought in due course in the territorial court in equity, under the terms of the statute.[36] (Point III, *supra.*) Or if the court is of the view that this is a proper case for declaratory relief (an issue argued under Point III) then declara-

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[36]Defendant-appellants had no opportunity to bring an enforcement suit in equity in the territorial court under the terms of the statute since the schools were not open. Likewise, the schools not being open, defendant-appellants could not submit, in the territorial court, to a stay of all proceedings under the statute, thereby holding the case in status quo in the federal court, as contemplated by section 266 of the Judicial Code (28 U.S.C.A. 380). For defendant-appellants to have submitted to such a stay in the territorial court would have been as erroneous as the issuance of a preliminary injunction in the federal court would have been, since any order of this kind would have effected a positive change in the status quo in violation of well-settled rules as to orders pendente lite (*Ball* v. *Paramount Pictures*, 57 F.Supp. 505, 507 (D.C.W.D.Pa. 1944); R. 47-49).

tory relief could be had in the territorial court." Thus we contend that, assuming without conceding that a cause of action has been stated here (as to which we submitted argument under Point III), nevertheless the proper limit of the present consideration of the case lies in the question put by plaintiff-appellees and which the lower court declined to answer (R. 112, Con. L. No. 1). This question, as we see it, is as follows: Was the territorial legislature acting within its constitutional powers when it sought to defer simultaneous instruction in English and Chinese to a point (fixed at the completion of the fourth grade) when English is sufficiently mastered to enable the child to undertake, without injurious results, intensive study of Chinese in a school devoted to that purpose? If this question is answered in the affirmative, then all questions as to the qualifications or exceptions to be made to the general requirements of the statute, and as to the conditions to govern such statutory regulation, should be laid aside to await interpretation of the statute via the territorial courts. This would mean dismissal of the case, not its retention to await the outcome of another suit in the territorial court, there being no need of equitable relief[38] against an enforcement proceeding in equity (Point III, *supra*).

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[37]Chapter 202, Revised Laws of Hawaii 1945, as amended by Act 74 (Ser. D-172) Session Laws of Hawaii 1945.

[38]When there is no need of equitable relief and interpretation questions arise, the case should be dismissed, not retained pending interpretation of the statute. (*Atlantic Fishermen's Union* v. *Barnes*, 71 F. Supp. 927, 928 (D.C.Mass. 1947).)

## V. The Statute Represents An Exercise of the Police Power Within the Legislature's Prerogatives.

(This point covers Assignments of Error 14-29, 31, 34, 36-42; Specifications of Error as noted below.)

Defendants necessarily concede that if it is not possible to frame any state or territorial statute seeking to regulate the study of foreign languages by extremely young children, i.e., if such a statute is not a proper subject of legislation, then the territorial statute in question must fall. We propose to show that in view of the facts which the legislature did and properly could find, it was acting well within its prerogatives under the police power when it legislated on this subject.

The Territory of Hawaii has police power similar to that of any state of the United States.[9] When a statute lies within the field of the police power, when there is a particular problem or evil to be met, and when the statute in question is reasonably directed to meet it, the statute has met the requirements for valid legislation. Our argument will be directed toward establishing these points.

The scope of the police power of a state or territory is not static, but has extended its boundaries as the need for legislation in wider fields has been recognized. A constitutional statute may be based on a need not previously recognized, or upon further study of a problem, developing facts and arguments not pre-

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[9] *Farrington* v. *Tokushige*, 273 U.S. 284.

viously appreciated.[40] That the injurious effects of simultaneous study of two or more languages by children of tender age is now recognized by experts in the pedagogical field, that conditions in Hawaii aggravate the injury, and that legislative action requiring deferral of bilingual studies until passage of the fourth grade is warranted, will be developed in this point. We anticipate that appellees will rely on cases arising twenty-five years ago, involving statutes framed with far different objectives from that of the statute here involved. Hence as an introduction to our argument we remark that it is no objection to the present statute that the need met by it was not recognized, or at least not acted upon, sooner.

A. THE STATUTE REPRESENTS A PROPER EXERCISE OF THE TERRITORY'S POWER AS PARENS PATRIAE, IN THE SAME FIELD AS THE COMPULSORY EDUCATION LAWS.

(This part of the argument covers Specification of Error No. 5).

The individual states have always had power as *parens patriae* to make regulations regarding the welfare, education and health of the children residing therein,[41] and have supervised and controlled their contracts, occupations and conduct, even though in conflict with the liberty and property of others.[42] In *Warner*

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[40] *People* v. *Charles Schwinder Press*, 214 N.Y. 395, 108 N.E. 639, 644, writ of error dismissed 242 U.S. 618; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379; *Holden* v. *Hardy*, 169 U.S. 366.

[41] *Fontain* v. *Ravenel*, 17 How. (U.S.) 369.

[42] *Sturges & Burn Mfg. Co.* v. *Beauchamp*, 231 U.S. 320; *Interstate Consol. Street Ry.*, v. *Comm. of Massa-*

*Bros. Pictures* v. *Brodel*, 31 Cal. 2d. 766, 179 P. 2d 57 (reversed 192 P. 2d 949 without affecting quotation below), involving a California statute requiring court approval to validate certain movie contracts of minors, the court explained the relationship of the state towards children:

> "Minors as a whole have always been set apart and have been given privileges and immunities not possessed by the people as a whole. Because they are mentally undeveloped and are unable to exercise a mature judgment the state as parens patriae exercises control over their affairs through manifold statutes passed for their benefit. The doctrine of parens patriae is the inherent power and authority of the state to provide protection of the person and property of a person non sui juris."

The state may override the parent when necessary. Statutes requiring parents to furnish food, clothing and medical attendance to their children have been upheld as enforcement of a duty owed by the parent to the child in which the state as *parens patriae* has a valid interest.[1] The state may legislate regarding custody, adoption and guardianship of children, the parents' right of control and custody being treated not as an absolute right but rather as subject also to the legitimate interest of the state in the health and well-being of

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*chusetts*, 207 U.S. 79; *Muller* v. *Oregon*, 208 U.S. 412; *U.S. ex rel. Schornback* v. *Behrendsohn*, 197 Fed. 953 (D.C.E.D. La. 1912).

[1] *Heinemann's Appeal*, 96 Pa. 112, 42 Am. Rep. 532; *People* v. *Pierson*, 176 N.Y. 201, 68 N.E. 243; *Owens* v. *State*, 6 Okla. Cr. 110, 116 Pac. 345; *Stehr* v. *State*, 92 Neb. 755, 139 N.W. 676; *Comm.* v. *Hoffman*, 29 Pa. Co. Ct. 65; *State* v. *Chenoweth*, 163 Ind. 94, 71 N.E. 197.

the children." The state may limit the hours of labor of children,[45] prohibit labor under specified ages,[46] regulate the employment of minors in street trades and public performances,[47] prohibit employment of children in certain occupations,[48] and otherwise regulate child labor.[49] Of course, there would be no occasion for such laws if the state and the parent were in agreement as to the required protection of the child. So here, we are dealing with a difference of opinion between the state and the parent as to the welfare of the child. In such a conflict the state, if its policies have a reasonable basis and its measures seek to protect the well-being of the child (as distinguished from compelling his acceptance of certain dogma), always prevails.

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[45] *Lippincott* v. *Lippincott*, 97 N.J.Eq. 517, 128 Atl. 254; *Wisconsin Industrial School for Girls* v. *Clark County*, 103 Wis. 651, 79 N.W. 422, 427; *Comm.* v. *Fisher*, 213 Pa. 48, 62 Atl. 198; *Ex parte Januszewski*, 196 Fed. 123 (Cir.Ct.S.D.La. 1911); *Wadleigh* v. *Newhall*, 136 Fed. 941 (Cir.Ct.N.D.Calif. 1905); *McIntosh* v. *Dill*, 86 Okla. 1, 1922, 205 Pac. 917; *Geary* v. *Geary*, 102 Neb. 511, 167 N.W. 778, error dismissed 251 U.S. 535.

[46] 90 A.L.R. 814, 815; *Muller* v. *Oregon*, 208 U.S. 412; *Riley* v. *Comm.*, 232 U.S. 671; *Miller* v. *Wilson*, 236 U.S. 373.

[47] *Sturges & Burn Mfg. Co.* v. *Beauchamp*, 231 U.S. 320; *Terry Dairy Co.* v. *Nalley*, 146 *Ark.* 448 (1920), 225 S.W. 887.

[48] *Prince* v. *Massachusetts*, 321 U.S. 158; *People* v. *Ever*, 141 N.Y. 129, 36 N.E. 4; 152 A.L.R. 579.

[49] *In re Spencer*, 149 Cal. 396, 86 Pac. 896; *Inland Steel Co.* v. *Yedinak*, 172 Ind. 423, 87 N.E. 229; *Bryant* v. *Skillman*, 76 N.J.L. 45, 69 Atl. 23.

[50] 12 A.L.R 1216.

The interest of the state in the well-being of its children was the basis for upholding the statute involved in the case of *Prince* v. *Massachusetts*, 321 U.S. 158. A state statute prohibited children from selling newspapers and other periodicals in any street or public place. The state and the parents differed as to the harmful effects of children so vending magazines. The statute was held valid even as to children selling religious literature, even against an attack based on alleged infringement of the child's and parent's rights under the First Amendment. The court said,

> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. (Citations.) And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well-being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. (Citation.) The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction."

Pp. 166-167

In the field of education, the state's power to legislate is established.[50] The state as parens patriae is vitally interested in securing to each child the opportunity to acquire an education, and to this end statutes compelling school attendance are valid.[51] Such compulsory school attendance laws may require that private education offer the equivalent of public school attendance.[52] The state may require physical examinations for school admittance, in order to prevent disruption of the school program by the spread of diseases, and in order to minimize the handicaps to participation in the school program suffered by children having physical defects.[53] The laws requiring vaccination of children and prohibiting school attendance of non-vaccinated children[54] are not only a health measure but also remove a health hazard interfering with the education program. In the case of In re Marsh, 140 Pa. Sup. Ct. 472, 14 A.2d 368, a minor was made a ward of the state as a "neglected" child because the father refused to have him vaccinated and the child

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[50]*Prince* v. *Massachusetts*, *supra*, and see next footnote.

[51]*State* v. *Bailey*, 157 Ind. 324, 61 N.E. 730; *State* v. *Hoyt*, 84 N.H. 38, 146 Atl. 170; *State* v. *Williams*, 56 S. Dak. 370, 228 N.W. 470.

[52]*State* v. *Hoyt*, *supra*, citing and differentiating *Pierce* v. *Society of Sisters*, 268 U.S. 510.

[53]*Streich* v. *Aberdeen Board of Education*, 34 S. Dak. 169, 147 N.W. 779.

[54]*Jacobson* v. *Massachusetts*, 197 U.S. 11; *Viemeister* v. *White*, 179 N.Y. 235, 72 N.E. 97; *Bissell* v. *Davison*, 65 Conn. 183, 32 Atl. 348; *Abeel* v. *Clark*, 84 Cal. 225, 24 Pac. 383; *Duffield* v. *School District*, 162 Pa.St. 476, 29 Atl. 742; *Cram* v. *School Board*, 82 N.H. 495, 136 Atl. 263; *State* v. *Drew*, 89 N.H. 54, 192 Atl. 629.

therefore could not attend school under the state's compulsory education law.

The premise of our argument is that as part of the compulsory school attendance program the state may make reasonable regulations to prevent or minimize handicaps put upon the child by his parent in his attainment of a basic education. Such handicaps when of a physical nature, such as child labor or non-immunity to smallpox, are readily recognized. That other handicaps are not as susceptible of detection does not deprive the state of its power to curb them by reasonable regulations, when they have been recognized and established by competent proof.

Plaintiff-appellee school corporations do not purport to offer a complete school program. There is not involved in this case any question of the right to impart a basic education using Chinese or another foreign language as the medium of instruction. This case starts out with the premise that "the pupils who attend said schools conducted by said plaintiffs are urged and required to attend the said public schools in their respective communities." (R. 59.) Plaintiff-appellee school corporations seem to think that in avoiding a conflict in hours of attendance they have avoided all conflict with the attainment by their pupils of a basic grade school education in the public schools. Such is not the case.

Hawaii provides good physical facilities for its schools, highly qualified teachers, a well rounded program of subjects, and in every other respect a school system of the highest calibre. (H. Rept. No. 1620, 79th Cong. 2d Sess., report of subcommittee of the Committee on the Territories, Findings No. 39 and 40, be-

ing Appendix 4 of H. R. Rep. No. 194, 80th Cong. 1st Sess., referring to the subcommittee report at p. 11. See also R. 529). Yet there is a retardation in the accomplishment of the school curriculum as compared with similar schools on the mainland. The cause of this retardation is the language problem. The basic grade school education is conducted through the medium of the English language. Lack of facility in the medium of learning is bound to retard the pupil. That this retardation exists and the over-all cause of it were recognized by the trial court and admitted by plaintiff-appellees.

Said the court below in its opinion:

> "* * * in many instances Hawaiian children are required to frame their thoughts and to express them in three distinct languages. One is the language of the home, where a child, say of Portuguese parents, has all his intimate home activities in Portuguese. Another is what is called 'pidgin,' an extension of that lingua franca of the China, South Asiatic and Malayan coast cities in which the foreign residents conduct their personal and commercial relations with the lesser educated resident nationals. To this the Hawaiian people have added words and phrases assimilated from the Portuguese, Hawaiian, Koreans and others. The testimony is that much of the inter-communication of children from homes where a foreign language is spoken is in this pidgin and that even some teachers use it in clarifying English words to their pupils. The third language is English.
>
> With many of the children so using the three languages, the testimony of the defendants is that there is in the sixth grade a retardation in accomplishment of the school's curriculum of over six months behind that of similar schools on the mainland. The parties dispute as to the major

> causa causans. Plaintiffs, while not contesting the retardation, contend that pidgin and not the language schools is the principal cause. Defendants claim it is because of the language schools." (R. 84)

The foregoing shows that the lower court found retardation in the school curriculum due to lack of facility in English. As to the lower court's further statement as to the nature of the dispute between the parties, this will be analyzed below.[55]

Mr. Wirin, attorney who appeared on behalf of the plaintiffs, admitted the retardation to be true. (R. 322.) Mr. John E. Reinecke, a witness for the plaintiffs, although he disagreed with the Territory as to the weight to be given the various factors affecting the situation, admitted that there is a language handicap among children entering the grade schools in Hawaii and that in their progress in their school studies the children are behind the mainland norms. (R. 227).

As the foregoing shows, lack of facility in English, the medium of learning, exists when the child comes to school and continues throughout his school life. This is explained in the Community Survey of Education in Hawaii, 1941, Defendant-Appellants' Ex. 1:

> "The total score of non-English Standard 6th grades in all subjects tested was 5.4. The mainland score is 6.2. This means that the non-English Standard 6th grade average is four-fifths of a year lower than the mainland score. The English Standard Schools average 6.2, exactly the same as the mainland. The largest differences in the scores are in reading comprehension and reading vocabulary and in language. The reading voca-

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[55] *Infra*, p. 69.

bulary score in the non-English Standard schools is more than two years below the English Standard score."

(R. 561)

"The non-English Standard 9th grade score is 7.7. The mainland score is 9.2. This means that the non-English 9th grade score is one and one-half years below that of the mainland. The English Standard score is 9.1, slightly below the mainland score. The largest differences, as in the 6th grade, are in reading vocabulary and reading comprehension."

(R. 561)

"* * * Many of our children are two years or more behind mainland children in English when they enter the first grade at six years of age."

(R. 563)

"The conclusion to be drawn from this study is that Hawaii's pre-school children of foreign ancestry who do not attend kindergarten are very seriously handicapped in oral English. They enter school with a two to three year retardation in speech."

(R. 571)

"* * * In the non-English Standard schools more errors are still found in the twelfth grade than are made by the first-grade children in English Standard schools.[56]

"In written English twelfth grade pupils in non-English Standard schools make about as many

[56]The Survey shows that English Standard school pupils have attainments comparable to mainland school pupils (R. 563, 575). These English Standard school pupils are less than twenty per cent of all public school pupils. (R. 245)

errors as do sixth grade children in English Standard schools. * * *"

(R. 573)

"In the qualities of interesting thought and clear way of saying things (correctness of grammar not being considered), pupils' informal written composition seems to be 2 to 6 years, on the average, behind that of mainland children of the same grade.* * * *"

(R. 585)

"In ability to understand what they read, pupils in local schools are, in general, fully a year behind mainland children of like grade (the retardation varing from ¾ to 1½ years in different grades)." * * *"

(R. 585)

Note also the following:

"But recently in the Manual of Child Psychology, edited by Carmichael in a chapter on child development, they brought data on a whole lot of areas in the United States, *and Honolulu bilinguals were at the bottom of any group of children.*" (Emphasis added) Testimony of Dr. Madorah Smith, R. 415).

The Community Survey found that the retardation was not confined to English. As a result of the retardation in the medium of learning, there is a general retardation.

"The pupils in general made higher scores in intelligence than in achievement. In grade VI the achievement was 10 points lower than the intelligence score; in grade IX, 7.8 points lower; and in grade XII, 10.5 points lower. *These figures indicate that the children on the average are achieving below their ability in both English Standard and non-English Standard schools.*"

(R. 562)

> "The tests bring out very strongly the effect of the language handicap on general academic achievement. *To get maximum improvement in school achievement the schools must aim first at improvement in English.*"
>
> (R. 563)

This improvement in the medium of learning must be accomplished while the children are in their early and formative years, the Survey shows.

> "The handicap must be attacked at or near the point of origin, while language habits are in the process of being formed. Only after this step is taken can more normal results be expected from school effort during later years."
>
> (R. 588)

Thus, as summarized by Dr. Loper, Superintendent of Public Instruction, one of the serious problems confronting the first grade teacher is to prepare the children to carry on the work of the schools. (R. 244, 246) They enter school with a handicap. The validity of the law must be considered in the light of this existing condition.

The law is based on the premise that bilingual studies by children of tender age are injurious. The result is retardation in acquisition of both the English and the foreign language. As above shown, retardation in English necessarily interferes with the child's progress in all subjects of the school curriculum. Bilingual studies at too early an age result in confusion and emotional disturbances. Where the foreign language is an oriental language the confusion is increased by the great differences in the two languages and in the teaching methods.

Committees of the legislature made reports (R. 33-39, received in evidence R. 452), which the legislature considered before passing the law now in question. These reports show that the legislature had before it and proceeded upon the basis of proof of the facts above outlined. Further such proof was adduced in court. The experts who testified are listed in the footnote.[7] The substance of their testimony was as follows:

As to the retardation in English (as well as the foreign language) and the general retardation in school work, resulting from too early bilingual studies:

[7] Dr. W. Harold Loper, Ph.D., Superintendent of the Department of Public Instruction of the Territory.

Dr. F. Deal Crooker, Ph.D., teacher in Hawaii.

Dr. Bruce White, Ph.D., associate professor of education at the University and acting dean of Teachers' College, University of Hawaii.

Mr. Richard Meyer, Assistant Superintendent of the Department of Public Instruction of the Territory.

Mr. Oren E. Long, former teacher, and at time of the trial Acting Governor of the Territory.

Dr. J. Robert Jacobson, M.D., clinical director at the Territorial Hospital at Kaneohe.

Mrs. Sarah Lee Yang, supervisor of fourth, fifth and sixth grades at Teachers' College Elementary School, University of Hawaii.

Miss Helen Gay Pratt, Director of Child Study and Remedial Work with Department of Public Instruction.

Mr. Orin W. Robinson, Deputy Superintendent and Director of Curriculum, Department of Public Instruction.

Mr. William Wong, Territorial School Principal (by stipulation).

Dr. Madorah E. Smith, Ph.D., retired psychologist and university teacher.

The large portion of first grade pupils with an existing language deficiency would be hindered or handicapped in the accomplishment of their regular school work, and have been so for many years, by commencing at the same time their studies of a foreign language.

(R. 245)

It has been found necessary that great stress be placed upon the English language in the first grade or just prior to the first grade.

(R. 246)

"* * * the introduction of a foreign language at such an early age is going to tend to confuse the child in the proper acquisition of skills in the English language, reading, that has to do with reading, it has to do with written work, it has to do with the spelling;"

(R. 298)

"* * * that would be the kind of a situation where neither thing was mastered."

(R. 310)

The study of foreign languages by children in the first four grades interferes with their regular public school work.

(R. 320)

Language school attendance and study on the part of children interferes with the work of the teachers in the public schools.

(R. 320-21)

The generalized English language deficiency has been adversely affected by the study of a foreign language by a large number of the children at the same time they are pursuing their regular school work.

(R. 323)

"I have noticed that most of the boys and girls that went to language schools spoke a brand of

English which was very much inferior to the other boys and girls."

(R. 365)

The study of a foreign language by children in the first four grades does interfere with their regular school progress.

(R. 387)

The retardation in the acquisition of English definitely interferes with the general progress of the children in the schools, and the child who is retarded or incapable in English is unable to carry on the work of the school, which is in English.

(R. 392)

The teaching of the Chinese language in the first few grades interferes with the progress of the children in the regular public school work, and their learning of the Chinese language can be better accomplished if it is taken up after completion of approximately the fourth grade of public school.

(R. 397)

The children who had not been to foreign language school made over twenty per cent higher score on reading tests, showed less confusion, and less than half as many errors of reversal as those who had gone to foreign language school.

(R. 405)

Intelligence tests, in both English and Japanese, given to bilingual children showed a retardation in both cases. The children were nine to fifteen years old and the younger children were much more retarded than the older children. It was concluded that the retardation was due to the fact that the children had not reached a mental stage which was required by bilingualism.

(R. 407)

It is the starting of two languages at the same time "that is particularly disastrous."

(R. 409)

"The trouble is that if these children are so badly retarded when they come to school, they certainly must have a chance to learn English before they are handicapped with trying to do another language at the same time."

(R. 415)

"A child must be of exceptional ability if he is to learn two languages at the same time."

(R. 413)

(Further such testimony is sumarized in Part D, pages 86-88, *infra.*)

As to the confusion and emotional disturbances resultant from too early bilingual studies, particularly where the foreign language is an oriental language:

In the teaching of English emphasis is placed on increasing the eye span of the child in reading from left to right, and the study of reading and writing of the oriental language which reads from top down and from right to left across the page interferes with such learning.

(R. 247 and 406).

English teaching stresses silent reading or orally in small groups; oriental language teaching stresses recitation in unison.

(R. 249)

The mouth expressions in forming sounds are different.

(R. 320)

There are differences in methods of teaching and arrangement of words and sentences.

(R. 345)

"* * * imagine the bewilderment of the six-year old child in Honolulu who starts to school and immediately is faced with the problem of trying to learn two languages, one beginning at the left on the top of the page and going east, and the other starting at the top right and going south."

(R. 406)

Where we are trying to teach a child that in one respect a response is correct, and in a very similar situation another response is correct, so the child doesn't know which he should do—"there will be difficulty, emotional disturbance of some sort, interference with learning."

(R. 310)

Where the child has been in a [language] school under one condition, then he comes to the public school and is asked to work under a different condition, he is bound to be disturbed.

(R. 322)

The difficulty in reading sets up a conflict in the child—it is harmful to a child to have these conflicts set up in himself.

(R. 338)

It seems inevitable that after a part of the day in a school with a certain atmosphere, certain methods, using the English language, having the beginning books, the primer, introduced with the established or traditional arrangement of the words, the sentences, for small children, then to go for a period of time the same day to a school where the atmosphere is different, that is, the whole setup, where the differences are so great in the materials used, there would be a considerable degree of confusion.

(R. 345-6)

Language disturbance was the outstanding evidence of general emotional disturbance of many

children in Hawaii who were given psychiatric attention and treatment.

(R. 373)

"I have been working with all the children enrolled in the first grade in specific schools, and I work with them myself in the classroom every day. I have yet to find a child that I think could take the burden of an additional language at that age."

(R. 390)

Educators in many countries have concluded that bilingual studies should be deferred at least until passage of the fourth grade. Dr. Madorah Smith referred to studies of educators as follows:[*]

1. Verheyens, in Belgium, comparing children who started a second language after ten or eleven, found they were much less handicapped by their bilingualism than those who had begun earlier.

(R. 408)

2. In Gaelic speaking communities in Scotland, children are not permitted to start learning to read and write Gaelic until they are ten years old "at which time they are reported to make very rapid progress because of the delay".

(R. 409)

3. In Sweden, where knowledge of the German language is regarded as essential for every Swedish child, the teaching of the German language commences in the fifth grade, and the teaching of English is commenced in the eighth school year, care being taken that the study of two languages is not started at the same time.

(R. 409)

[*]See also page 91, *infra*, showing that more rapid progress is made in the foreign language when the study of it is delayed until the first language has been sufficiently mastered.

4. In Switzerland, the second language is not commenced until the upper primary, or approximately ten years of age. While this country has three official languages, French, German and Italian, in the lower grades children may undertake studies only in one language. For example, in a given area a family might sent a child to a French speaking school or to a German speaking school, but the family cannot send the child to both. Irrespective of which is the first language studied, the second language is not started until the child is approximately ten years of age, which is the beginning of the upper primary. If there is a third language, that is to wait until still later.

(R. 409-410, 410-411)

5. Saer, an authority in Wales, based on researches showing that growth of vocabulary is relatively slow between five and nine years of age, then increases rapidly, concluded that the acquisition of a second language should be delayed in the schools until about nine years of age.

(R. 410)

6. The conclusion from a study made by a French university professor of the bilingual difficulty in Alsace-Lorraine was that children should delay even beyond the age of eleven or twelve years before undertaking the study of a second language.

(R. 411)

It is important to note that in bilingual countries the practice is to defer the commencement of a course of study in the second language at least until passage of the fourth grade.[59] Such prevailing practices support the legislative determination.[60]

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[59] Items 2, 3 and 4, of the studies above cited

[60] *Jacobson* v. *Massachusetts*, *supra*, 197 U.S. 11, 35; *Viemeister* v. *White*, *supra*, 179 N.Y. 235, 72 N.E. 97.

To summarize the dispute between the parties: It has been shown and is admitted by plaintiff-appellees that children in Hawaii come to school with a handicap of deficiency in the English language, the medium of instruction, and this handicap continues throughout their school life. Whether this handicap at the inception of the school curriculum is due to the fact that the pupils speak more than one language or is due to the prevalence of pidgin English is not the issue. It is not claimed that this initial handicap is due to foreign language studies, as distinguished from mere conversational usage, for foreign language instruction in reading and writing in the schools conducted by plaintiff-appellees before the war, commenced in the first grade. Hence, the dispute between the parties is not as to the cause of the English handicap at the inception of the child's schooling but as to the treatment of the situation thereafter. The dispute concerns the power of the legislature to regulate what is in itself an added handicap to the child during his early and formative school years, that is, the handicap incident to intensive study of a foreign language at a time when he is not mature enough to undertake it.

Of the three handicaps to facility in English, the medium of instruction, the two which plaintiff-appellees conceded to exist could not practicably be controlled. That is, informal use by children of a foreign language in their home or at play, as a natural part of their environment, could not be legislated out of existence. Nobody would wish to so legislate. As to pidgin English, improvement gradually is being made, but it cannot be legislated out of existence. The legislature could and did act as to the third matter, that is, the handicap to the child who has commenced

school, and if not protected, may be put to intensive study of a foreign language at the very time when he is least able to cope with it and most needs to acquire facility in English in order to carry on his basic school studies.

Under well-settled rules,[61] proof of other handicaps, such as the prevalence of pidgin English, not controlled by the legislature because it is not practicable to do so, does not mitigate against its authority to cope with this particular handicap. Even conflicting opinion as to whether too early bilingual studies are a handicap to the child does not mitigate against the authority of the legislature, for it has the power to decide which body of opinion it will follow.[62]

The object of the Territory's legislation being to prevent or minimize a handicap to the child, the statute is clearly distinguishable from those held invalid in the *Society of Sisters*, *Meyer* and *Tokushige* cases. In *Meyer* v. *Nebraska*, 262 U.S. 390, the court found that the object of the law was "to foster a homogeneous people with American ideals * * *". (P. 402.) The law sought to combat foreign influences, which were said to imperil the public safety. (P. 401.) The law did not forbid bilingual studies as such, for Latin and Greek might be taught at any time. On this account and from lack of proof to the contrary, the opinion of Mr. Justice McReynolds assumed that instruction in a foreign language at an early age was not injurious to the child. He further assumed that foreign language instruction must begin at an early age for proficiency in the language to be acquired. (P. 403.)

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[61] *Keokee Coke Co.* v. *Taylor*, 234 U.S. 224; *Standard Oil Co.* v. *Marysville*, 279 U.S. 582, 586.

[62] *Infra*, part C of this point.

Both of these assumptions have been disproved here. Hence it cannot be supposed here, as it was in *Meyer* v. *Nebraska*, that children of tender years are able to absorb their common school studies in the English language and instruction in a foreign language, side by side, without impingement of the one upon the other. That supposition, made in *Meyer* v. *Nebraska*, reduced the statute there involved to the proposition that it was unpatriotic for one not thoroughly steeped in American ideals to pursue the study of a foreign language; in fact this was the argument made in support of the statute (pp. 393-4) and adopted by the lower court (pp. 397-8). Thus the statute in the *Meyer* case was one of those seeking to promote the acceptance of American ideals.

Likewise in the other cases the object of the statute was the promotion of the state's Americanization program, not the protection of the child. In *Farrington* v. *Tokushige*, *supra*, 273 U.S. 284, the declared purpose of the statute was "to fully and effectively regulate the conducting of foreign language schools and the teaching of foreign languages, in order that the Americanism of the pupils may be promoted." And in *Pierce* v. *Society of Sisters*, 268 U.S. 510, the object of the statute was the promotion of the "safety and power of the State itself." A statute having a similar object was the one involved in *West Virginia State Board of Education* v. *Barnette*, *supra*, 319 U.S. 624, 639. There the regulation was intended to promote loyalty to the state, and was not concerned with the welfare of the child; the regulation actually led to the exclusion of the child from school. The regulation sought to compel the acceptance of certain

beliefs, not to relieve the child of a handicap to his acquisition of learning.

Thus the foregoing cases involved statutes of a type and having a purpose plainly distinguishable from that now under consideration. In said cases the conflict lay directly between the rights of the parent on the one hand and the state, for its own protection, on the other. As previously pointed out, the conflict involved here lies between the state and parents as to what is in the best interests of the child.

The state's own power, protection, and security, or the state's aggrandizement, although the same may be a legitimate object of legislation, is not the same type of purpose as the welfare of children, and the cases dealing with the former cannot be regarded as determinative of the present case dealing with the latter. In the *Meyer* v. *Nebraska* line of cases, the only showing was that the statute was desirable to eliminate adherence to foreign customs, which in themselves constituted no danger to the state; the desirability or non-desirability of adherence to foreign customs is a matter wholly outside of the scope of the Hawaiian statute and the present case.

### B. The Clear and Present Danger Rule Does Not Apply.

(This part of the argument, with Part C, infra, supports Specification of Error No. 6.)

The general rule, which defendant-appellants submit governs the present controversy, is that a statute enacted under the police power is valid unless

shown to be arbitrary and without reasonable basis.[63] Defendant-appellants contend there is no merit to the claim, advanced by plaintiff-appellees in the trial in the lower court, that the clear and present danger rule is applicable, under which rule a statute may be invalidated unless the act or acts prohibited involve a clear and present danger of substantive evils which the legislature has a right to prevent.[64]

The clear and present danger rule does not apply in the present case for two reasons: (1) The rule does not apply to a conflict between the state as parens patriae and the parent as to the welfare of the child; and (2) the rule applies only in First Amendment cases and this is not such a case.

(1) THE CLEAR AND PRESENT DANGER RULE DOES NOT APPLY TO A CONFLICT BETWEEN THE STATE AS PARENS PATRIAE AND PARENTS AS TO THE WELFARE OF THE CHILD.

In the case of *Prince* v. *Massachusetts*, *supra*, 321 U.S. 158, it was held that a state statute imposing penalties on a parent or guardian who permitted a minor to sell papers or merchandise in public places was valid even as to the sale of religious literature. Religious liberty under the First Amendment was clearly involved and the clear and present danger rule was invoked. It was recognized that this rule would have invalidated a similar law applied to adults, but the court rejected the clear and present danger

[63] *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 191; *Standard Oil Co.* v. *Marysville*, 279 U.S. 582; *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342; *Townsend* v. *Yeomans*, 301 U.S. 441.

[64] *Abrams* v. *United States*, 250 U.S. 616, 630.

rule in that case because the statute was enacted for the welfare of the child. It was a case of conflict of opinion between the family and the state, as parens patriae, as to the welfare of the child, governed by the usual rule "that the state has a wide range of powers for limiting parental freedom and authority in things affecting the child's welfare" (id. p. 167), and "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults" (id. p. 170).

Similarly, other cases involving a conflict between the religious freedom of the parent and the welfare of the child have been decided on the usual presumptions and tests of reasonableness rather than from the standpoint of clear and present danger.[65] In *Commonwealth* v. *Herr*, 229 Pa. 132, 78 Atl. 68, a law prohibiting teachers on duty from wearing religious garb was held valid in spite of the claimed conflict with the teacher's right to religious freedom, and without application of the clear and present danger rule. Cases involving a conflict between the liberty of the parent under the Fourteenth Amendment and the welfare of the child are the same. The statute in *People* v. *Ewer*, 141 N.Y. 129, 36 N.E. 4, which prohibited exhibitions by children was upheld against attack under the due process clause of the Fourteenth Amendment, the court stating that it would only interfere with arbitrary exercise of legislative power and not with the judgment of the legislature.

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[65] *People* v. *Pierson*, 176 N.Y. 201, 68 N.E. 243; *Owens* v. *State*, 6 Okla.Cr. 110, 116 Pac. 345; *Comm.* v. *Hoffman*, 29 Pa.Co.Ct. 65; *State* v. *Chenoweth*, 163 Ind. 94, 71 N.E. 197.

Thus the court did not apply the clear and present danger rule.

We have shown that the cases involve two types of legislation: (a) legislation promoting the education, health and well-being of the child and removing obstructions thereto; and (b) legislation designed to control or censor the content of the child's thought, so as to shape him in the direction the state elects he should go.

In the first type of situation the clear and present danger rule does not apply. The parent's right of custody or control does not extend to the point of overruling a legislative finding of injury to the child or interference with the child's rights, such rights of the child including the right to secure an education, as well as to be protected from ill health, disease, injurious labor, or neglect. Legislation requiring vaccination of the child, restricting or prohibiting child labor, compelling attendance at public or private schools, and the like, comes under this category. The common element in these cases is that the state's regulation seeks to protect the opportunities of the child. So here, the state seeks to open the child's mind, not to close it. There is no denial of the right to study Chinese customs and history at any time, nor is there any denial of the right to study Chinese, merely deferral of such study for a reasonable period because bilingual studies at too early an age will handicap the child in his acquisition of a general education.

The clear and present danger rule would properly be applied to legislation which sought to control the

child's thinking, to close his mind to certain concepts and ideas, or compel the acceptance of those ideals deemed beneficial by the state. Such was the nature of the *Meyer* v. *Nebraska* line of cases and *West Virginia* v. *Barnette*. The difference between securing a basic education to a child on the one hand, and affirmatively directing his every thought on the other, is brought out in *State* v. *Hoyt*, *supra*, 84 N.H. 38, 146 Atl. 170.

(2) THE CLEAR AND PRESENT DANGER RULE APPLIES ONLY TO FIRST AMENDMENT CASES, AND THE TERRITORIAL STATUTE IS NOT SUCH A CASE.

In the present case the plaintiffs are not claiming infringement of any rights under the First Amendment. The complaint specifies the Fifth Amendment as the basis for suit (Amended Complaint, Par. III, R. 57) and the only plaintiffs remaining in the case are the corporation schools and a teacher of Chinese, each claiming their property has been taken without due process of law.

By the nature of plaintiffs' case, no rights under the First Amendment could be involved, but only property or liberty under the due process clause of the Fifth Amendment. Hence it is readily understood why only the Fifth Amendment was specified in the complaint.

In *West Virginia State Board of Education* v. *Barnett*, *supra*, 319 U.S. 624, 639, the court pointed out that the clear and present danger rule does not apply to liberty asserted generally under the due pro-

cess clause apart from the First Amendment guarantees. In that case, requiring a child to salute the American flag was held unconstitutional and the clear and present danger rule was applied, because there was a violation of a First Amendment principle, asserted under the Fourteenth Amendment. The flag salute was contrary to the religion of the child. The regulation sought to compel, not to protect the child, for "the State * * * employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks." (319 U.S. at p. 633.)

The clear and present danger rule was a gradual evolution from early dissents in First Amendment cases[66] which were later accepted as the majority opinion of the Court. In every case where it has been applied liberties guaranteed under the First Amendment have been involved.[67]

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[66] *Abrams* v. *United States*, 250 U.S. 616, 630; *Schaefer* v. *United States*, 251 U.S. 466, 486; *Gitlow* v. *New York*, 268 U.S. 652, 672.

[67] *Whitney* v. *California*, 274 U.S. 357, 374 (Criminal Syndicalism Act); *Bridges* v. *California*, 314 U.S. 252, 261 (newspaper comment); *Schenck* v. *United States*, 249 U.S. 47, 52 (espionage act); *Herndon* v. *Lowry*, 301 U.S. 242 (anti-insurrection act); *Thornhill* v. *Alabama*, 310 U.S. 88 (picketing); *Thomas* v. *Collins*, 323 U.S. 516 (registration of labor union speakers); *Schneider* v. *State*, 308 U.S. 147, 163 (distribution of printed matter and holding public meetings); *Lovell* v. *Griffin*, 303 U.S. 444, 451 (distribution of literature); *Stromberg* v. *California*, 283 U.S. 359, 369 (displaying red flag at meeting).

### C. The Conflict in Expert Opinion as to the Harmfulness of Simultaneous Study of English and Oriental Languages by Extremely Young Children is for the Legislature, Not the Courts, to Resolve.

(This part of the argument, with Part B, supra, supports Specification of Error No. 6.)

Since the clear and present danger rule does not apply, the usual presumptions as to constitutionality prevail in the instant case. As part and parcel of the presumption of constitutionality, where there is a conflict of opinion as to the facts upon which the statute is based the legislature alone has the prerogative of deciding which body of expert opinion it will follow.[a] In the present case the legislature adopted that body of expert opinion which holds that bilingual instruction is harmful to a young child. Such opinion accordingly cannot be rejected by the court even though the members of the court, were they sitting in the legislature, might be disposed to reject it. There was a difference of expert medical opinion in the early vaccination cases cited in note 54 *supra*, but the law was upheld even though its efficacy as a preventative was considered debatable and it was even thought that there might be harmful results in some cases.

When the legislature incorporates findings of fact in a statute, its prerogative of resolving conflicts of

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[a] *Erie R. Co.* v. *Williams*, 233 U.S. 685, 699; *Nashville etc. R. Co.* v. *Walter*, 294 U.S. 405; *Jacobson* v. *Massashusetts*, 197 U.S. 11, 30; *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 191; *Standard Oil Co.* v. *Marysville*, 279 U.S. 582; *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342; *Townsend* v. *Yeomans*, 301 U.S. 441.

opinion is especially clear. Such findings spell out the bases for the legislation, instead of leaving it for the court to speculate as it otherwise would have to, whether the legislature in fact did proceed on the basis urged before it. When, as here, such findings are supported by competent opinion, even if not universal opinion, such findings are not reversible by the courts." In *San Francisco* v. *Market Street Ry. Co.*, 98 F.2d 628, cert. denied 305 U.S. 657, rehearing denied 306 U.S. 667, a city ordinance prohibited one-man street cars in the city of San Francisco. Legislative findings set forth that one-man street cars increased traffic hazards and were dangerous to the public. The lower federal court had made its own study of the facts, hearing expert testimony on the same, had overruled the findings of the legislature and had granted a permanent injunction against enforcement of the act; but on appeal to the circuit court, its decision was reversed. The Circuit Court refused to disturb the legislative findings when there was conflicting evidence, and compared the legislative prerogative to that of a jury:

> " 'Within the field where men of reason may reasonably differ, the legislature must have its way.' *Williams* v. *Mayor*, 289 U.S. 36, 42, 53 S.Ct. 431, 433, 77 L.Ed. 1015; *Missouri Pacific R. Co.* v. *Norwood*, 283 U.S. 249, 255, 51 S.Ct. 458, 461, 75 L.Ed. 1010. If there is substantial evidence to sustain constitutionality, although there may be strong contrary evidence, the question is fairly debatable. It is somewhat similar

"*United States* v. *Carolene Products Co.*, 304 U.S. 144.

Same rule applies as to state statute, *Sullivan* v. *Shreveport*, 251 U.S. 169, 172.

to a jury case. A question is to be decided by a jury when there is substantial evidence on one side, despite strong evidence on the other side." (Pp. 633-634)

In the present case the legislative findings are supported not only by the opinion of expert witnesses but also by the evidence of educational practices prevailing in bilingual countries.[11] That such prevailing practice is to defer the formal study (as distinguished from conversational knowledge) of a second language until at least passage of the fourth grade, clearly supports the legislature in accepting that body of opinion which holds that earlier bilingual studies are both harmful and unnecessary to the learning of a foreign language, and in rejecting that body of opinion which holds that the best way to learn a foreign language is to make it one of the first studies undertaken by the child.

D. "CHILDREN OF AVERAGE INTELLIGENCE" MEANS AND REFERS TO THE GENERAL RUN OF CHILDREN BOTH THE LEGISLATIVE FINDINGS AND THE TESTIMONY OF THE WITNESSES RELATE TO ALL BUT EXCEPTIONALLY BRILLIANT CHILDREN.

(This part of the argument further supports Specification of Error No. 3, and covers Specifications of Error Nos. 7 and 8.)

"Children of average intelligence" as used in the legislative findings clearly means the general run of children, excluding only the very small percentage of exceptionally brilliant children.

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[11] *Supra*, part A, pages 67-68.

It would not be necessary to elaborate this point were it not for the opinion of the lower court which, through a strained construction put on the words "children of average intelligence", created a constitutional difficulty in the statute by causing the legislative findings to relate to only half of the children while applying the rest of the statute to all of the children.

We submitted in Point IV *supra* that under the doctrine of deference the trial court should not have rested the case on the interpretation of the statute, in the absence of its interpretation by the territorial courts. That in any event the trial court's construction was erroneous, will now be shown.

According to the standard unabridged dictionaries, the word "average", used as an adjective as it is here, has two possible definitions.

> (a) *The mathematical meaning of average*: Equaling an arithmetical mean (Webster's New International Dictionary, 2d edition, unabridged, 1948).
>
> (b) *The non-technical, common meaning of average*: Ordinary, usual; common, typical (Webster's, supra). Of medium character, quality, etc.; midway between extremes; ordinary. (Century Dictionary & Cyclopedia, 1911).

The word "average" has been applied by the courts in either its techinal or non-technical meaning according to the context and use of the word. Courts frequently use the word "average" as interchangeable with "normal", i.e., the second of the meanings above quoted from the dictionary.[2] Upon consideration of

[2] *Woodruff* v. *State*, 164 Tenn. 530, 51 S.W. 2d 843, 848, *State* v. *Haner*, 186 Iowa 1259, 173 N.W. 225, 226.

the context of the statute it could have no other meaning in this case.

As above noted[7] all territorial statutes are enacted in the light of the rules of construction laid down in the Revised Laws of Hawaii, and section 10 thereof requires examination of the context to determine the meaning of dubious words. Since the word "average" has a dual meaning, its meaning is necessarily dubious if considered alone, although if taken with the context its meaning is clear.

The legislative findings, even without consideration of the rest of the statute, clearly show that the legislature was concerned with children as a whole. The findings state that bilingual study "by children of average intelligence in their early and formative years" retards progress in their normal studies; that bilingual study "in such early and formative years" causes emotional disturbances; that bilingual teaching acts "to the detriment, as foresaid, of children in their early and formative years;" that foreign language study should be deferred for the welfare of "children of tender age" "until each child" shall have passed the fourth grade "unless such child is earlier able to speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and in reading."

Thus, from a reading of the entire findings contained in section 1 of the statute, it appears that the legislature was concerned with "children of tender age" as a class. "Each such child" was included in the findings, which are in harmony with section 3 of

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[7]Note 28, supra.

the statute, not at cross purposes as held by the trial court. Section 3 provides that "no child" shall be taught a foreign language until and unless he meets certain requirements.[74] There is no difficulty in following the usual rule of construing the statute as a whole.

The phrase, "children of average intelligence" was used once at the outset of the findings to indicate that there were some exceptional children to whom the findings did not apply. These exceptional children were defined in the findings as those who though in the general class of "children of tender age" nevertheless were able to test 5.0 on standard tests in English composition and reading. Defendant-appellants read the same exception into section 3, where there is room for it because of reference to the equivalent of passage of the fourth grade. As the findings in section 1 show, the legislature decided that the attainment of a test score of 5.0 gave assurance of English proficiency sufficient for the child to progress in his basic school studies; thus the legislature considered such English proficiency the equivalent of actual demonstration of progress in the basic school studies through actual passing of the fourth grade.

Under the usual rules of construction, the court will not presume that the legislature intended to pass an unconstitutional law.[75] As a necessary corollary, the court should have presumed that the legislature did not intend in section 3 to enact the law for a different group of children from those covered in the findings in section 1 of the statute. This is an addi-

[74]These requirements are outlined in Part E of this point.

[75]Note 32, supra, Point IV.

tional reason why the statute should have been interpreted as a whole, in accordance with well settled principles.

The following quotations from the legislative committee reports, made to the legislature before it adopted the statute in question, show that the legislature was considering the effects of bilingual study on children of school age generally, and not just those of mean average intelligence:

> "However, your committee is convinced that the mental health and well-being of young children, as well as their ability to assimilate their English language and other required studies, can be seriously affected by the emotional disturbances, conflicts and maladjustments which are caused by compelling them to be learning two languages at the same time in their earlier years, especially where the differences are as great as those between English and an Oriental language." (From the report of the Committee on Education, Territorial Senate, March 30, 1943, R. 33, 37, in evidence by stipulation, R. 452.)

> "There is no doubt that the teaching of foreign languages in the past in this territory has impeded the teaching of children in the public schools. This is particularly true in the case of the oriental language schools, because a young child who is learning the English language and our alphabet is bound to have a difficult time simultaneously learning an oriental language which is a wholly different system of reading and writing." (From the report of the Committee on Education, Territorial House of Representatives, April 21, 1943, R. 37, in evidence by stipulation, R. 452.)

The witnesses likewise were testifying about the great body of children. To support the Court's finding

No. 13 (R. 112 ) there necessarily would have to be some competent testimony (a) drawing a line between the brighter and less bright children, with about half of the children in each group, and (b) taking the position that as to the brighter half, as distinguished from the lower half, there was no harmful effect from bilingual studies prior to passage of the fourth grade. The existence of such testimony would throw the case squarely upon the issue whether the court had the prerogative of accepting this testimony and rejecting the testimony which the legislature had accepted.[76] However, there was no testimony that the injurious effect of too early bilingual study depended upon whether the child was in the brighter or less bright half. The court's finding No. 13 therefore does not follow the line of testimony on either side, but on the contrary makes the court the sponsor of a brand new theory. Counsel for plaintiff-appellees advanced no such theory in the trial court.

The expert witness on the plaintiffs' side was testifying about all children:

> Dr. John E. Reinecke, teacher in the territorial public school system, testified that while "studies show that bilingualism is a retarding factor in the use of English" the relationship between such retardation and the Chinese and Japanese language school was "little or none;" that such retardation is "found among children who have not attended any school, pre-school children." (R. 213.) In his opinion there was no causal relationship between the teaching of foreign language in language school and emotional disturbances apparent "to one who has observed students over a period of a good many years."
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> (R. 221)

[76] Part C of this point, supra.

The expert witnesses for the Territory likewise testified about all children, though reaching the opposite conclusion, that is, that there were various harmful effects to the general run of students from too early bilingual study:

> Dr. W. Harold Loper, Superintendent of the Department of Public Instruction for the Territory, testifying as to the language deficiency in the territorial schools, stated that the first grade teacher "frequently has as one of her serious problems the building up of a vocabulary with the children so that they can carry on the work of the schools."
>
> (R. 246)

> Dr. F. Deal Crooker, private school teacher and president, felt that it was "unsound" for children in the first four elementary grades to take up the study of a foreign language; that research indicates "that the child of elementary school age has not matured to the degree that he is able to take up a foreign language at such an early age."
>
> (R. 292)

> Dr. Bruce White, University of Hawaii professor, speaking of children generally, found that emotional disturbances and interferences with learning were caused by "trying to have the children learn two conflicting things at once."
>
> (R. 310)

> Mr. Richard E. Meyer, Assistant Superintendent of the Department of Public Instruction, found from "observing children in their language work especially" that the foreign language schools do interfere with the regular work in the public schools.
>
> (R. 320)

> Mr. Oren E. Long, then Acting Governor of the Territory and educator, testified that "on the

basis of my experience and observation and my knowledge of trends in the public and private schools of the United States, my opinion is that it would be in the best interest of the children not to start them at the same time in the study of their own language, that is, the English language, and in some foreign language."

(R. 344)

Mr. Emanuel Kwon, teacher and vice-principal in an elementary school of the Territory, said "I have noticed that most of the boys and girls that went to the language schools spoke a brand of English which was very much inferior to the other boys and girls."

(R. 365)

Dr. J. Robert Jacobson, clinical director of the Territorial Hospital, testified only as to children requiring psychiatric treatment, but his testimony tended to show that there was a close causal connection between emotional difficulty and language deficiency, and that a relatively large percentage of school children in the Territory require special assistance from his department.

(R. 370-385)

Mrs. Sarah Lee Yang, supervisor, Teacher's College, University of Hawaii, testified that in her opinion the study of a foreign language by children in the first four grades interferes with their regular school progress.

(R. 387)

Mr. Orin W. Robinson, Deputy Superintendent and Director of Curriculum, Department of Public Instruction, speaking of children generally, stated that there is a generalized English language deficiency in the territorial schools which interferes with the children's general progress in the schools; that postponement of the teaching and study of foreign languages until children had fin-

ished the first four grades would allow "a foundation of English control which would make it possible for the children then to branch out and carry heavier burdens."

(R. 392)[77]

The testimony of Dr. Madorah Smith clearly concerns the effects of bilingual study on the general run of students. Her testimony is discussed below.

The lower court's view that it had supported its construction of the word "average" as used in the legislative findings by reference (R. 85) to the sense in which the word is used by a witness, Dr. Madorah Smith, in part of her testimony adds nothing more to the case than reference to the dictionary, by which we have already developed that the word has a technical meaning of "mean average" as well as the meaning of "normal." The relevant question is, did Dr. Smith testify that bilingual study by children of tender age was injurious in the general run of cases? When her testimony is read as a whole, this is the clear purport of her testimony,[78] and the sentences quoted in the

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[77] And note testimony summarized in Part A, pages 63 to 68, supra.

[78] Examples of her testimony:

(1) From her own research in the Territory she found that "the children who had not been to foreign language school did over twenty per cent higher score on reading, on the reading tests", that those who had attended foreign language school showed more confusion in orientation tests, and over twice as many errors of reversal of words, and she concludes, "imagine the bewilderment of the six-year old child in Honolulu who starts to school and immediately is faced with the problem of trying to learn two languages, one beginning at the left on the top of the page and going

court's opinion are not contradictory."

east, and the other starting at the top right and going south." (R. 404-406.)

(2) She summarizes the opinions of various educators who recommend as to children in general that the study of a second language be postponed because more rapid progress can be made at a later age and to avoid confusion between the two languages (R. 407-408, 410-411); she agrees with the opinion of Saer of Wales, an authority, that "growth of vocabulary is relatively slow between five and nine years old" (R. 410); and states that "very few educators would advocate to any person at any age starting two languages at the same time." (R. 412.)

(3) She notes the prevailing practice in Scotland, Sweden, Switzerland and other countries to be to postpone the formal study of a second language until the child is ten years old or older. (R. 409.)

(4) In addition, she states that "the children who are trying to learn two languages at the same time are apt to become confused"; and "a child must be of exceptional ability if he is to learn two languages at the same time." (R. 413.)

She was there saying (R. 415) that the English speech handcap eventually could be overcome by the "bright" children, but about half the children never would overcome it. Her further testimony, immediately following, shows that though there is a gradual improvement in the upper grades, the children of Hawaii do not as a whole, even up to the twelfth grade, ever reach the mainland standard as to their English studies in general. Of course, even if a child by the time he finishes school speaks fairly good English, the problem has not been solved. It is necessary that the English handicap be overcome in the first school years, to lay the groundwork for the basic school studies. (Page 61, supra.) Otherwise there is ground lost which can never be regained.

## E. The Provisions of the Statute Are Reasonable.

(This part of the argument further supports Specifications of Error Nos. 3 and 5, and covers Specifications of Error Nos. 9 and 10.)

That a legislature, having found an evil which may be met under the police power, must frame its corrective statute so that the requirements thereof are reasonably directed to meet the evil found to exist,[80] is conceded by appellants. The statute here involved conforms to this principle; moreover, the burdens it imposes on schools and parents are negligible. Such slight restrictions are fully justified by the need to relieve the children of the Territory from the added handicap put upon them by too early bilingual studies.

As to the school corporations, we have already pointed out in Part II hereof that there is every reason to expect that the schools will have substantially as many pupils if they now begin to operate under the law as they would have if the law were not in force. This is substantiated by the experience of a school which did open in compliance with the statute, and when the case was heard, was operating under the statute. (R. 359-360.)

With regard to the parents, the right for which they seek to establish protection is that of having their

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[80]The rule only requires that the provisions of the statute have a reasonable relation to the object of their enactment. The rule does not bring within the range of judicial cognizance the wisdom or unwisdom of the enactment, this being a matter for the judgment of the legislature. *Bayside Fish Co.* v. *Gentry*, 297 U.S. 422, 427-428.

children taught a foreign language (R. 80). If the children, though deferring their foreign language instruction until they have passed the fourth grade, nevertheless can and will learn the language satisfactorily, or at least to the same degree of accomplishment as they would if the delay of approximately four years were not required, the parents will not be deprived of the right they seek to protect.

Plaintiff-appellees did not endeavor to establish by any expert testimony that the effective study of a foreign language must be undertaken before a child reaches the age of ten years; defendant-appellants on the other hand, presented adequate and convincing evidence that the acquisition of the foreign language can be accomplished at least as well if not better, where an intensive course of study is not commenced until the age of approximately ten years or even later. (R. 250, 292-297, 347, 365-366, 397, 409, 412.) This is borne out by the studies made by educators in other countries, above cited.[81]

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[81] Part A. pp. 67-68. The following further studies are worthy of note:

A 1927 study by Buswell, comparing students who started French in elementary school and those who started in high school or college, concluded that the latter group made much more rapid progress. (R. 407-408.)

A study by Cole & Thorp pointed out that there was a tendency to delay the study of any foreign language until the ninth grade. (R. 411.)

Vasconnelles, in France, believes that children should wait until they are twelve years old for their second study. (R. 411.)

A report of the Committee on Modern Language in Great Britain stresses the importance of not beginning foreign language study too early. (R. 411.)

The attention of this Court is respectfully directed to the fact that the statute contains no restriction whatever on the use of the Chinese language by parents, by children, or by anyone; parents who wish to impart a knowledge of any foreign language to their children may readily adopt it as the language of the home, may have their children associate with others who use the language, or follow any similar procedure through which the children will acquire a familiarity with the language. The challenged statute makes no regulation of such matters, but is limited by its terms to the regulation of the formalized intensified study of the language, such study being what the Legislature expressly found to be harmful to children in their early and formative years, and which finding was abundantly supported by the evidence introduced by defendant-appellants.

The requirements of the statute, in so far as material to this case, are stated below. We have set forth our interpretation of the statute, which is a reasonable one. If this interpretation is disputed by plaintiff-appellees, then as previously submitted[*] the correctness of the interpretation is a matter that properly should be tried in an enforcement proceeding brought in the territorial equity court.

1. The statute defers commencement of foreign language study until passage of the fourth grade, as a general rule. Such study may be commenced at an earlier time, whenever a child is able to attain a score of 5.0 on standard tests in English composition and in reading. (R. 43-44, admitted in evidence R. 427; supra, pp. 44-45, 82-84.)

[*] Supra, Point IV, pp. 41-42, 44-49; Point III, p. 38.

2. A child need have only passing grades in English on the standard tests which are regularly given to school children, in order to continue with bilingual studies. (R. 43-44, admitted in evidence R. 427; R. 138, 141, 174, 176, 178, 242.)

3. A teacher of foreign languages must have a certificate that he is reasonably well versed in the usage and idiom of the foreign language to be taught by him. (Plaintiff-appellees did not challenge this requirement.)

4. A teacher of foreign languages must have a certificate that he is reasonably well versed in the usage and idiom of the English language. This means that the teacher must have enough English to be able to explain differences in usage and idiom between English and the foreign language (R. 35, Committee Report, received in evidence, R. 452).

5. The requirements of the statute cease to have any application as to all children attaining the age of fifteen years, or passing the eighth grade, whichever is the earlier.

6. The requirements of the statute operate only within the field of formal, intensified instruction; such as that of the classroom. Instruction by parents is not regulated by the statute. (R. 145.)[*] Mere con-

[*] As above noted, questions of interpretation should be settled in the territorial court. The territorial court would follow the rule of so construing the statute as to save its constitutionality. Note 33, *supra*, p. 46. Such is the rule in this court, *supra*, note 32, p. 46, particularly *Jacobson* v. *Massachusetts*, 197 U.S. 11, 38-39. Where a severability clause in a statute specifically provides that if applicability of the statute

versational usage of a foreign language, whether outside the home or within the family group, is not the subject of the statute. (There is not involved here any case of tutoring outside the classroom, except as presented by the parents, who were plaintiffs in the amended complaint, and who stated that they wished to teach their own children, a matter which the statute does not regulate.)

Items 1-4, *supra*, set forth the requirements of the statute, Items 5-6 being included to show the scope of operation of these requirements. Of the four requirements, one is not challenged, as above noted, and even under the lower court's opinion would fall only if the statute were an inseverable whole. To the contrary, each of the four requirements stands on its own merits. Invalidation of any one of them would not invalidate any of the others.

Questions of severability are interpretation questions, within the deference rule". The territorial courts

to any person or circumstance is held invalid, the applicability of its provisions to other persons and circumstances shall not be affected, such provision calls for a narrow construction, and "clearly evidences" the legislative intention "that any implication from the terms of the Act which would render them invalid should not be indulged". *Crowell* v. *Benson*, 285 U.S. 22, 63. The severability clause of the statute here involved contains just such a provision as was involved in *Crowell* v. *Benson*; the severability clause is set forth *infra*, p. 95.

"*Watson* v. *Buck*, *supra*, 313 U.S. 387, 396; *Rescue Army* v. *Municipal Court*, *supra*, 331 U.S. 549, 573; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572.

follow the rule of severability."

The statute has a severability clause, reading as follows:

> "Section 7. (Saving Clause.) If any portion of this Act, or the application thereof to any person or circumstances, shall be held to be unconstitutional or invalid, the remainder of this Act, or the application of such portion to other persons and circumstances, shall not be affected."

Appendix I"

Such a severability provision has great weight."

Upon review of the four requirements of the law (*supra*, Items 1-4) their severability appears, particularly in the light of the section of the statute above quoted. For example, the provision as to the time of commencement of foreign language study is not inseparably connected with the second requirement that having commenced such study, the child shall not continue the same if harmed thereby to the extent of failing to pass with his class in his English studies. Invalidity of the requirement that he maintain passing standards in English would not destroy the good accomplished by deferring bilingual studies until passage of the fourth grade and the intent of the legislature to at least maintain the provision against too early bilingual studies is clear. So also invalidity of the

"*Territory* v. *Tam*, 36 Haw. 32, 41; *In re Atcherley*, 19 Haw. 535, 542.

"This section remains in effect though not included in chapter 31 of the Revised Laws of Hawaii 1945, having been continued in effect by the act enacting the Revised Laws of Hawaii 1945, Act 1 of the Session Laws of Hawaii 1945, section 2 g.

"*Utah Power and Light Co.* v. *Pfost*, 286 U.S. 165, 184; *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 42.

requirement that the foreign language teacher be reasonably well versed in English, in order to be able to warn his young pupils against carrying over of foreign idiom into English (item 4, *supra*) would not invalidate the provision as to the time of commencement of foreign language study, which in itself would accomplish a great deal toward reaching the legislative objective.

## CONCLUSION

An enforcement proceeding in a territorial court of equity, as provided in the statute, would have been the proper way of testing the statute. Once entertained, the case should have turned on the primary question of the power of the legislature to enact a statute deferring simultaneous instruction in English and a foreign language until passage of the fourth grade. Questions turning upon the interpretation of the statute, which the territorial courts have not had an opportunity to construe, should not have been considered, nor should the courts have considered hypothetical questions outside the issues framed by the amended complaint on the one hand and by the intended administration of the statute by the officers responsible therefor, on the other.

The question of the power of the legislature to enact a statute deferring simultaneous intensive study of English and a foreign language must be judged against the factual background. Admittedly, children in Hawaii come to school with a serious deficiency in English, the medium of instruction. Admittedly, progress in the basic school studies is retarded by this handicap in English. The school child in the early grades must overcome this handicap and lay the foun-

dation for his accomplishment of the basic school studies.

The early school years are the very time when, as found by a very substantial body of expert opinion, a child is unable to undertake a course of study in a foreign language simultaneously with his English studies. This is particularly true when the foreign language is as dissimilar from English as are the Oriental languages.

In seeking to relieve children of the confusion, emotional upset and retardation involved in too early bilingual studies, the legislature was acting as parens patriae. In other instances where parents have misguidedly handicapped their children this power of the legislature has been recognized, and the clear and present danger rule has not been applied.

Even though there was some evidence conflicting with the legislative findings, such findings were supported by substantial expert testimony and by evidence of prevailing educational practices. The legislature has the prerogative of adopting one or the other of two views in that situation. It is not for the courts to resolve the conflict of opinion.

The statute does not seek to and will not prevent the learning of foreign languages. A second language can be learned as well or even better if the intensive study of it is deferred until passage of the fourth grade, or even later.

The statute is not to be confused with those of twenty-five years ago or with the flag-salute regulations. Those were instances where the state sought to close the child's mind to foreign influences, and to shape

him in what was deemed to be the American ideal. The present statute is based on a principle recognized throughout the world, even in countries officially bilingual. It seeks to provide greater, not less, opportunities for learning.

The decree of the lower court should be reversed and the action dismissed.

Dated at Honolulu, T.H., this 7th day of December, 1948.

Respectfully submitted,

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# APPENDIX I

## ACT 104, Session Laws of Hawaii 1943 (Chapter 31, Revised Laws of Hawaii 1945)

AN ACT Regulating the Teaching of Foreign Languages to Children

Be it Enacted by the Legislature of the Territory of Hawaii:

(Sec. 1871) Section 1. *Declaration of legislative findings.* It is hereby declared that the study and persistent use of foreign languages by children of average intelligence in their early and formative years definitely detract from their ability properly to understand and assimilate their normal studies in the English language, which are required by law to be pursued by all children of school age, and definitely retard their progress in understanding and assimilating such studies; that the study and persistent use of such foreign languages in such early and formative years may and do, in many cases, cause serious emotional disturbances, conflicts and maladjustments; that the teaching of foreign languages compels and encourages the study and persistent use of such foreign languages, to the detriment, as aforesaid, of children in their early and formative years; that it is to the best interest, and will best promote the health and welfare, of children of tender age that such foreign language studies not be undertaken until each child shall have completed and passed at least the fourth grade or shall have attained the age of nine years, unless such child is earlier

able to speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and in reading; and that the teaching and study of foreign language to and including the eighth grade or the age of fifteen years should be regulated in the public interest to avoid the detrimental results herein set forth to which end each of the provisions of this Act shall be enacted.

(Sec. 1872) Section 2. *Definitions.* As used in this Act:

(a) "School" means any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice.

(b) "Public school" means a public school as defined in section 729 of the Revised Laws of Hawaii 1935.

(c) "Standard test" shall be the test which is so designated and determined by the department of public instruction from time to time from such tests as are generally recognized by educators.

(Sec. 1873) Section 3. (*Qualifications of pupils.*) No child shall be taught a foreign language in any school unless he shall comply with one of the following requirements: (a) That he shall have passed the fourth grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public

instruction attaining a score not lower than normal for his grade; or (b) that he shall have passed the eighth grade in public school or its equivalent; or (c) that he shall have attained the age of fifteen years.

(Sec. 1874) Section 4. (*Qualifications of teachers; board of examiners.*) No school shall permit the teaching of any foreign language to any child under the age of fifteen unless the teacher shall have been examined and certified by a board of examiners of three persons appointed by the commissioners of public instruction to be reasonably well versed in the usage and idiom of both the English language and the foreign language to be taught by such teacher. The commissioners of public instruction shall appoint one or more of such boards of examiners as may be necessary. Of the members of each such board, at least two shall be well versed in the usage and idiom of both the English language and the foreign language to be taught by the teacher to be examined, and the third shall be well versed in the usage and idiom of at least one of said languages. Such board shall examine each applicant to teach such foreign language. If such applicant is found to be qualified pursuant to this section, such board shall so certify to the commissioners, who shall cause a certificate of such qualification to be issued to such teacher. No charge shall be made for such examination and certification. The expenses of such boards of examiners, including compensation, if any, allowed by the commissioners of public instruction, shall be paid out of any appropriations for the department of public instruction for general administration or teachers' salaries, or both.

(Sec. 1875) Section 5. (*Inspection by department of public instruction.*) Any supervising principal, or

other duly authorized representative of the department of public instruction of the Territory, at any time during which such school is in operation, shall have power to attend any school, for the purpose of ascertaining whether the provisions of this Act are being complied with, and it shall be the duty of every person in charge of, or employed at, such school to permit such representative of the department at any such time to attend the classes and activities of such school for said purposes.

(Sec. 1876) Section 6. (*Proceedings to ensure compliance; duties of attorney general and county attorneys.*) In the event any school or any person shall be found to be violating, or failing to comply with any of the requirements of this Act, or there shall be reasonable cause to believe that such school or person is violating, or failing to comply with the requirements of this Act, the attorney general, at his own instance or at the request of the department of public instruction, shall institute appropriate proceedings in equity in the circuit court in which the violation occurs to enjoin the performance of any acts or practices forbidden by this Act, or to require such school or person to comply with the requirements of this Act. Jurisdiction to hear and dispose of all actions under this section is hereby conferred upon each circuit court, and each such court shall have power to issue such orders and decrees, by way of injunction, mandatory injunction or otherwise, as may be appropriate to enforce the provisions of this Act. In the event any respondent or respondents shall fail or refuse to comply with any such order or decree, the court, in addition to any other powers hereby granted, shall have power to enjoin the operation and conduct of such

school until and unless this Act is complied with or satisfactory assurance is given that this Act will be complied with. The county attorney of each county shall, at the request of the attorney general, conduct such proceeding in behalf of the Territory. All such suits shall be brought in the name of the Territory by the attorney general.

Section 7. (Saving clause.) If any portion of this Act, or the application thereof to any person or circumstance, shall be held to be unconstitutional or invalid, the remainder of this Act, or the application of such portion to other persons and circumstances, shall not be affected.

Section 8. This Act shall take effect upon July 1, 1943.

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## APPENDIX II

### U. S. Code—Title 48

### Territories and Insular Possessions

(Sec. 86 of the Hawaiian Organic Act, as it read at the time of adjudication of the case below.)

Sec. 641. District court; session; powers; terms.

There shall be established in the Territory of Hawaii a district court, to consist of two judges, who shall reside therein and be called district judges, and who shall each receive an annual salary of $10,000. The two judges shall from time to time, either by order or rules of the court, prescribe at what times and in what classes of cases each of them shall preside.

The two judges may each hold separately and at the same time a session of the court (whether at the

same or different terms of court, regular or special) and may preside alone over such session. The said two judges shall have the same powers in all matters coming before the court; and in case two sessions of the court are held at the same time, the judgments, orders, verdicts, and all proceedings of a session of the court, held by either of the judges, shall be as effective as if one session only were being held at a time.

Regular terms of said court shall be held at Honolulu on the second Monday in April and October, and special terms may be held at such times and places in said district as the said judges may deem expedient. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119; Feb. 12, 1925, ch. 220, 43 Stat. 890; Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919; July 31, 1946, c. 704, 60 Stat. 716.)[1]

Sec. 642. Jurisdiction of district court; authority of officers.

The said court shall have the jurisdiction of district courts of the United States, and shall proceed therein in the same manner as a district court; and the said judges, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district courts of the United States. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; Mar.

[1] Deleted by the amendment of section 86 made by Public 773, 80th Cong., 2d Sess., c. 646, s. 8, effective September 1, 1948.

3, 1911, ch. 231, § 291, 36 Stat. 1167; July 9, 1921, ch. 42, § 313, 42 Stat. 119.)

Sec. 643. Appointment and term of office of judges, district attorney, and marshal.

The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint two district judges, a district attorney, and a marshal of the United States for the said district, all of whom shall be citizens of the Territory of Hawaii and shall have resided therein for at least three years next preceding their appointment. Said judges, attorney, and marshal shall hold office for six years unless sooner removed by the President. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119.)

Sec. 644. Salaries of clerk and reporter; deputy clerk.

A clerk of the district court shall be appointed as provided in section 6 of Title 28, at a salary to be fixed in accordance with section 558 of Title 28. The number and compensation of deputy clerks shall be fixed by the attorney general as in other judicial districts. The said district judges shall appoint a reporter of said court at a salary of $1,200 per annum. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1412; July 9, 1921, ch. 42, § 313, 42 Stat. 119; June 1, 1922, ch. 204, title II, 42 Stat. 614, 616; Jan. 3, 1923, ch. 21, title II, 42 Stat. 1084.)

Sec. 645. Appeals.

Appeals from the said district court shall be had and allowed to the circuit court of appeals for the

ninth judicial circuit in the same manner as appeals are allowed from district courts to circuit courts of appeal as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54.)

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## APPENDIX III

### Legislative History

8 U.S.C. Sec. 43 and former Title 28 U.S.C. Sec. 41(14)

The derivation of the substantive provision, 8 U.S.C. Sec 43, is indicated in the annotations to the section in both the United States Code and the United States Code Annotated and has been traced by the courts, as in *Hague* v. *Committee for Industrial Organization*, 101 F. 2d 774 (C.C.A. 3d), at p. 788; in the same case, 307 U.S. 496, at p. 510; and in *Screws* v. *United States*, 325 U.S. 91, at p. 99, n. 8. Said section is derived from Rev.

The first sentence was deleted and the second sentence substantially reenacted by the amendment of section 86 made by Public 773, 80th Cong., 2d Sess., c. 646, s. 8, effective September 1, 1948.

Stat. Sec. 1979, which in turn was derived from section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13. These successive provisions are herein set out in full, beginning with the present United States Code:

"Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

8 U.S.C. Sec. 43

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rev. Stat. Sec. 1979

"* * * That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several

district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication'; and the other remedial laws of the United States which are in their nature applicable in such cases."

Sec. 1 of Act of April 20, 1871, 17 Stat. 13

For the purposes of this case, the noteworthy change was in the addition in the Revised Statutes of the words "or Territory" after the word "State". Whatever may have been the reason for the insertion by the revisors the words may not be disregarded but must be taken as part of the existing law. *United States* v. *Bowen*, 100 U.S. 508.

The derivation of the jurisdictional provision, 28 U.S.C. Sec. 41(14), has likewise been noted in annotations to the section as well as in judicial opinions. In an opinion by Mr. Justice Roberts in *Hague* v. *Committee for Industrial Organization*, *supra*, 307 U.S. 496, at page 508, note 10, its history is traced as follows:

"The section is derived from Rev. Stat. § 563, 28 U.S.C.A. § 41 (14), par. 12, which, in turn, ori-

While it is immaterial whether the word "State" as used in the original act would have been construed to include the territories or whether the insertion enlarged the scope of the law, it is noteworthy that, as the cases already cited show, the Civil Rights Act was enacted in effectuation of the Fourteenth Amendment, which applies to States.

ginated in § 3 of the Civil Rights Act of April 9, 1866, 14 Stat. at L. 27, chap. 31, as reenacted by § 18 of the Civil Rights Act of May 31, 1870, 16 Stat. at L. 144, chap. 114, and referred to in § 1 of the Civil Rights Act of April 20, 1871, 17 Stat. at L. 13, chap. 22."

The successive provisions referred to (except Sec. 1 of Act of April 20, 1871, 17 Stat. 13, hereinabove quoted) read as follows, beginning with the former Title 28 of the United States Code:

"The district courts shall have original jurisdiction as follows: * * *

*Suits to redress deprivation of civil rights.* Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

28 U.S.C. Sec. 41(14)

"* * * the district courts shall have jurisdiction as follows: * * *

Twelfth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof."

Rev. Stat. Sec. 563

"* * * That the district courts of the United States, within their respective districts, shall have

exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be

extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty."

Sec. 3 of Act of April 9, 1866, 14 Stat. 27

"* * * That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act."

Sec. 18 of Act of May 31, 1870, 16 Stat. 144

Unlike the substantive section, the jurisdictional section, in both the United States Code and Revised Statutes versions, referred only to deprivation under color of state authority, as distinguished from deprivation under color of territorial authority. The question is whether the action of the revisors, in expressly providing for rights of action for deprivations of civil rights under color of territorial authority, should be set at naught for failure to provide a forum for the enforcement of such rights. Such a conclusion could be avoided either by construing the word "state" as used in the jurisdictional section to include the territories, as in *Andres* v. *United States*, cited in the text of this brief, or by determining that paragraph 14 applied to the Territory of Hawaii by virtue of the then provisions of the Hawaiian Organic Act, giving this court the jurisdiction and procedure of a District Court of the United States. Of course Hawaii was not a territory when the Revised Statutes were enacted in 1873. But other territories existed, and it is pertinent to determine what the revisors who inserted the word "terri-

tory" in what is now section 43 of Title 8, U.S.C. (R.S. 1979) intended as to a forum for the enforcement of civil rights in the territories. In the Revised Statutes the jurisdiction of the district courts in the territories was defined as follows:

> "Each of the district courts in the Territories mentioned in the preceding section shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States; and the first six days of every term of the respective district courts, or so much thereof as is necessary, shall be appropriated to the trial of causes arising under such Constitution and laws; but writs of error and appeals in all such cases may be had to the supreme court of each Territory, as in other cases."
>
> Rev. Stat. Sec. 1910
>
> (The territories mentioned in Rev. Stat. Sec. 1909 were New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana and Wyoming.)

Therefore, it is reasonable to suppose that the revisors did not insert the word "territory" in what became paragraph 14 of section 41, former Title 28 of the U.S. Code (R. S. 563), because R. S. 1910 made it unnecessary to do so. By like reasoning, the provisions of the Hawaiian Organic Act made it unnecessary for the word "territory" to appear in paragraph 14 of section 41 in order that this paragraph might apply to the Territory of Hawaii.